

**§§ 4274.357–4274.360**

**§§ 4274.357–4274.360 [Reserved]**

**§ 4274.361 Requests to make loans to ultimate recipients.**

(a) An intermediary may use revolving funds to make loans to ultimate recipients without obtaining prior Agency concurrence. When an intermediary proposes to use Agency IRP loan funds to make a loan to an ultimate recipient, and prior to final approval of such loan, Agency concurrence is required.

(b) A request for Agency concurrence in approval of a proposed loan to an ultimate recipient must include:

(1) Certification by the intermediary that;

(i) The proposed ultimate recipient is eligible for the loan;

(ii) The proposed loan is for eligible purposes;

(iii) The proposed loan complies with all applicable statutes and regulations;

(iv) The ultimate recipient is unable to finance the proposed project through commercial credit or other Federal, State, or local programs at reasonable rates and terms; and

(v) The intermediary and its principal officers (including immediate family) hold no legal or financial interest or influence in the ultimate recipient, and the ultimate recipient and its principal officers (including immediate family) hold no legal or financial interest or influence in the intermediary except the interest and influence of a cooperative member when the intermediary is a cooperative;

(2) For projects that meet the criteria for a Class I or Class II environmental assessment or environmental impact statement as provided in subpart G of part 1940 of this title, a completed and executed request for environmental information on a form provided by the Agency;

(3) All comments obtained in accordance with § 4274.337(a), regarding intergovernmental consultation;

(4) Copies of sufficient material from the ultimate recipient's application and the intermediary's related files, to allow the Agency to determine the:

(i) Name and address of the ultimate recipient;

(ii) Loan purposes;

(iii) Interest rate and term;

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(iv) Location, nature, and scope of the project being financed;

(v) Other funding included in the project; and

(vi) Nature and lien priority of the collateral.

(5) Such other information as the Agency may request on specific cases.

**§§ 4274.362–4274.372 [Reserved]**

**§ 4274.373 Appeals.**

Any appealable adverse decision made by the Agency which affects the intermediary may be appealed in accordance with USDA appeal regulations found at 7 CFR part 11.

**§§ 4274.374–4274.380 [Reserved]**

**§ 4274.381 Exception authority.**

The Administrator may, in individual cases, grant an exception to any requirement or provision of this subpart which is not inconsistent with any applicable law, provided the Administrator determines that application of the requirement or provision would adversely affect USDA's interest.

**§§ 4274.382–4274.399 [Reserved]**

**§ 4274.400 OMB control number.**

The reporting and recordkeeping requirements contained in this regulation have been approved by the Office of Management and Budget under the provisions of 44 U.S.C. chapter 35 and have been assigned OMB control number 0570–0021 in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507).

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LOANMAKING**

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AUTHORITY: 5 U.S.C. 301; 7 U.S.C. 1932(a); and 7 U.S.C. 1989.

SOURCE: 61 FR 67633, Dec. 23, 1996, unless otherwise noted.

## Subpart A—General

### § 4279.1 Purpose.

(a) This subpart contains general regulations for making and servicing Business and Industry (B&I) loans guaranteed by the Agency and applies to lenders, holders, borrowers and other parties involved in making, guaranteeing, holding, servicing, or liquidating such loans.

(b) It is the responsibility of the lender to ascertain that all requirements for making, securing, servicing, and collecting the loan are complied with.

(c) Copies of all forms, regulations, and Instructions referenced in this subpart are available in any Agency office. Whenever a form is designated in this subpart, that designation includes predecessor and successor forms, if applicable, as specified by the field or National Office.

### § 4279.2 Definitions and abbreviations.

#### (a) Definitions.

*Adjusted tangible net worth.* Tangible balance sheet equity plus allowed tangible asset appreciation and subordinated owner debt.

*Agency.* The Rural Business-Cooperative Service or successor Agency assigned by the Secretary of Agriculture to administer the B&I program. References to the National Office, Finance Office, State Office or other Agency offices or officials should be read as prefaced by “Agency” or “Rural Development” as applicable.

*Allowed tangible asset appreciation.* The difference between the current net book value recorded on the financial statements (original cost less cumulative depreciation) of real property assets and the lesser of their current market value or original cost, where current market value is determined using an appraisal satisfactory to the Agency.

*Arm's-length transaction.* The sale, release, or disposition of assets in which the title to the property passes to a ready, willing, and able disinterested third party that is not affiliated with or related to and has no security, monetary or stockholder interest in the borrower or transferor at the time of the transaction.

*Assignment Guarantee Agreement (Business and Industry).* Form RD 4279–6, the signed agreement among the Agency, the lender, and the holder containing the terms and conditions of an assignment of a guaranteed portion of a loan, using the single note system.

*Biogas.* Biomass converted to gaseous fuel.

*Biomass.* Any organic material that is available on a renewable or recurring basis including agricultural crops, trees grown for energy production, wood waste and wood residues, plants, including aquatic plants and grasses, fibers, animal waste and other waste materials, fats, oils, greases, including recycled fats, oils and greases. It does not include paper that is commonly recycled or unsegregated solid waste.

*Borrower.* All parties liable for the loan except for guarantors.

*Commercially available.* Energy projects utilizing technology that has a proven operating history, and for which there is an established industry for the design, installation, and service (including spare parts) of the equipment.

*Conditional Commitment (Business and Industry).* Form RD 4279–3, the Agency's notice to the lender that the loan guarantee it has requested is approved subject to the completion of all conditions and requirements set forth by the Agency.

*Deficiency balance.* The balance remaining on a loan after all collateral has been liquidated.

*Deficiency judgment.* A monetary judgment rendered by a court of competent jurisdiction after foreclosure and liquidation of all collateral securing the loan.

*Energy projects.* Commercially available projects that produce or distribute energy or power and/or produce biomass or biogas fuel. Commercially available energy projects that utilize technology that has a proven operating history, and for which there is an established industry for the design, installation, and service (including spare parts) of the equipment.

*Existing lender debt.* A debt not guaranteed by the Agency, but owed by a borrower to the same lender that is applying for or has received the Agency guarantee.

*Fair market value.* The price that could reasonably be expected for an asset in an arm's-length transaction between a willing buyer and a willing seller under ordinary economic and business conditions.

*Farmer's Home Administration (FmHA).* The former agency of USDA that previously administered the programs of this Agency. Many Instructions and forms of FmHA are still applicable to Agency programs.

*Finance Office.* The office which maintains the Agency financial accounting records located in St. Louis, Missouri.

*High-impact business.* A business that offers specialized products and services that permit high prices for the products produced, may have a strong presence in international market sales, may provide a market for existing local business products and services, and which is locally owned and managed.

*Holder.* A person or entity, other than the lender, who owns all or part of the guaranteed portion of the loan with no servicing responsibilities. When the single note option is used and the lender assigns a part of the guaranteed note to an assignee, the assignee becomes a holder only when the Agency receives notice and the transaction is completed through the use of Form RD 4279-6 or predecessor form.

*Interim financing.* A temporary or short-term loan made with the clear intent that it will be repaid through another loan. Interim financing is frequently used to pay construction and other costs associated with a planned project, with permanent financing to be obtained after project completion.

*Lender.* The organization making, servicing, and collecting the loan which is guaranteed under the provision of the appropriate subpart.

*Lender's Agreement (Business and Industry).* Form RD 4279-4 or predecessor form between the Agency and the lender setting forth the lender's loan responsibilities when the Loan Note Guarantee is issued.

*Loan Agreement.* The agreement between the borrower and lender containing the terms and conditions of the loan and the responsibilities of the borrower and lender.

*Loan Note Guarantee (Business and Industry).* Form RD 4279-5 or predecessor form, issued and executed by the Agency containing the terms and conditions of the guarantee.

*Loan-to-value.* The ratio of the dollar amount of a loan to the dollar value of the collateral pledged as security for the loan.

*Natural resource value-added product.* Any naturally occurring product that is processed to add value to the product. For example, straw is processed into particle board.

*Negligent servicing.* The failure to perform those services which a reasonably prudent lender would perform in servicing (including liquidation of) its own portfolio of loans that are not guaranteed. The term includes not only the concept of a failure to act, but also not acting in a timely manner, or acting in a manner contrary to the manner in which a reasonably prudent lender would act.

*Parity.* A lien position whereby two or more lenders share a security interest of equal priority in collateral. In the event of default, each lender will be affected on a *pro rata* basis.

*Participation.* Sale of an interest in a loan by the lender wherein the lender retains the note, collateral securing the note, and all responsibility for loan servicing and liquidation.

*Poor.* A community or area is considered poor if, based on the most recent decennial census data, either the county, city, or census tract where the community or area is located has a median household income at or below the poverty line for a family of four; has a median household income below the non-metropolitan median household income for the State; or has a population of which 25 percent or more have income at or below the poverty line.

*Promissory Note.* Evidence of debt. "Note" or "Promissory Note" shall also be construed to include "Bond" or other evidence of debt where appropriate.

*Qualified Intellectual Property.* Trademarks, patents or copyrights included on current (within one year) audited balance sheets for which an audit opinion has been received that states the financial reports fairly represent the values therein and the reported value

has been arrived at in accordance with GAAP standards for valuing intellectual property. The supporting work papers must be satisfactory to the Administrator.

*Refinancing loan.* A loan, all of the proceeds of which are applied to extinguish the entire balance of an outstanding debt.

*Rural Development.* The Under Secretary for Rural Development has policy and operational oversight responsibilities for RHS, RBS and RUS.

*Spreadsheet.* A table containing data from a series of financial statements of a business over a period of time. Financial statement analysis normally contains spreadsheets for balance sheet items and income statements and may include funds flow statement data and commonly used ratios. The spreadsheets enable a reviewer to easily scan the data, spot trends, and make comparisons.

*State.* Any of the 50 States, the Commonwealth of Puerto Rico, the Virgin Islands of the United States, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, the Republic of Palau, the Federated States of Micronesia, and the Republic of the Marshall Islands.

*Subordinated owner debt.* Debt owed by the borrower to one or more of the owner(s) that is subordinated to debt owed by the borrower to the Agency or guaranteed by the Agency (aggregate B&I loan exposure) pursuant to a subordination agreement satisfactory to the Agency. The debt must have been issued in exchange for cash loaned to the borrower for the benefit of the borrower's business. The terms of the subordination agreement must provide that repayment will not commence until the earlier of the date all aggregate B&I loan exposure has been repaid or when a period of three consecutive years has passed during which the borrower has met all loan covenants and evidenced operating profit sufficient to commence partial repayment of this subordinated debt after giving effect to the annual debt service requirements of the aggregate B&I loan exposure. The partial repayment schedule in the case of the latter scenario is subject to annual Agency concurrence and may not be more accelerated than the rate

of the debt repayment schedule in effect for the Agency's aggregate B&I loan exposure.

*Subordination.* An agreement between the lender and borrower whereby lien priorities on certain assets pledged to secure payment of the guaranteed loan will be reduced to a position junior to, or on parity with, the lien position of another loan in order for the Agency borrower to obtain additional financing, not guaranteed by the Agency, from the lender or a third party.

*Tangible balance sheet equity.* Total equity less the value of intangible assets recorded on the financial statements, as determined from balance sheets prepared in accordance with generally accepted accounting principles (GAAP), plus qualified intellectual property.

*Veteran.* For the purposes of assigning priority points, a veteran is a person who is a veteran of any war, as defined in section 101(12) of title 38, United States Code.

(b) *Abbreviations.*

B&I—Business and Industry  
CF—Community Facilities  
CLP—Certified Lenders Program  
FSA—Farm Service Agency  
FMI—Forms Manual Insert  
NAD—National Appeals Division  
OGC—Office of the General Counsel  
RBS—Rural Business-Cooperative Service  
RHS—Rural Housing Service  
RUS—Rural Utilities Service  
SBA—Small Business Administration  
USDA—United States Department of Agriculture

(c) Accounting terms not otherwise defined in this part shall have the definition ascribed to them under GAAP.

[71 FR 33187, June 8, 2006]

§§ 4279.3–4279.14 [Reserved]

§ 4279.15 Exception authority.

The Administrator may, in individual cases, grant an exception to any requirement or provision of this subpart which is not inconsistent with any applicable law provided, the Administrator determines that application of the requirement or provision would adversely affect USDA's interest.

**§ 4279.16 Appeals.**

Only the borrower, lender, or holder can appeal an Agency decision made under this subpart. In cases where the Agency has denied or reduced the amount of final loss payment to the lender, the adverse decision may be appealed by the lender only. An adverse decision that only impacts the holder may be appealed by the holder only. A decision by a lender adverse to the interest of the borrower is not a decision by the Agency, whether or not concurred in by the Agency. Appeals will be handled in accordance with 7 CFR, part 11. Any party adversely affected by an Agency decision under this subpart may request a determination of appealability from the Director, National Appeals Division, USDA, within 30 days of the adverse decision.

**§§ 4279.17–4279.28 [Reserved]****§ 4279.29 Eligible lenders.**

(a) *Traditional lenders.* An eligible lender is any Federal or State chartered bank, Farm Credit Bank, other Farm Credit System institution with direct lending authority, Bank for Cooperatives, Savings and Loan Association, or mortgage company that is part of a bank-holding company. These entities must be subject to credit examination and supervision by either an agency of the United States or a State. Eligible lenders may also include credit unions provided, they are subject to credit examination and supervision by either the National Credit Union Administration or a State agency, and insurance companies provided they are regulated by a State or National insurance regulatory agency. Eligible lenders include the National Rural Utilities Cooperative Finance Corporation.

(b) *Other lenders.* Rural Utilities Service borrowers and other lenders not meeting the criteria of paragraph (a) of this section may be considered by the Agency for eligibility to become a guaranteed lender provided, the Agency determines that they have the legal authority to operate a lending program and sufficient lending expertise and financial strength to operate a successful lending program.

(1) Such a lender must:

(i) Have a record of successfully making at least three commercial loans annually for at least the most recent 3 years, with delinquent loans not exceeding 10 percent of loans outstanding and historic losses not exceeding 10 percent of dollars loaned, or when the proposed lender can demonstrate that it has personnel with equivalent previous experience and where the commercial loan portfolio was of a similar quantity and quality; and

(ii) Have tangible balance sheet equity of at least seven percent of tangible assets and sufficient funds available to disburse the guaranteed loans it proposes to approve within the first 6 months of being approved as a guaranteed lender.

(2) A lender not eligible under paragraph (a) of this section that wishes consideration to become a guaranteed lender must submit a request in writing to the State Office for the State where the lender's lending and servicing activity takes place. The National Office will notify the prospective lender, through the State Director, whether the lender's request for eligibility is approved or rejected. If rejected, the reasons for the rejection will be indicated to the prospective lender in writing. The lender's written request must include:

(i) Evidence showing that the lender has the necessary capital and resources to successfully meet its responsibilities.

(ii) Copy of any license, charter, or other evidence of authority to engage in the proposed loanmaking and servicing activities. If licensing by the State is not required, an attorney's opinion to this effect must be submitted.

(iii) Information on lending experience, including length of time in the lending business; range and volume of lending and servicing activity; status of loan portfolio including delinquency rate, loss rate as a percentage of loan amounts, and other measures of success; experience of management and loan officers; audited financial statements not more than 1 year old; sources of funds for the proposed loans; office location and proposed lending

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area; and proposed rates and fees, including loan origination, loan preparation, and servicing fees. Such fees must not be greater than those charged by similarly located commercial lenders in the ordinary course of business.

(iv) An estimate of the number and size of guaranteed loan applications the lender will develop.

(c) *Expertise.* Loan guarantees will only be approved for lenders with adequate experience and expertise to make, secure, service, and collect B&I loans.

### § 4279.30 Lenders' functions and responsibilities.

(a) *General.* (1) Lenders have the primary responsibility for the successful delivery of the B&I loan program. All lenders obtaining or requesting a B&I loan guarantee are responsible for:

(i) Processing applications for guaranteed loans,

(ii) Developing and maintaining adequately documented loan files,

(iii) Recommending only loan proposals that are eligible and financially feasible,

(iv) Obtaining valid evidence of debt and collateral in accordance with sound lending practices,

(v) Supervising construction

(vi) Distribution of loan funds,

(vii) Servicing guaranteed loans in a prudent manner, including liquidation if necessary,

(viii) Following Agency regulations, and

(ix) Obtaining Agency approvals or concurrence as required.

(2) This subpart, along with subpart B of this part and subpart B of part 4287 of this chapter, contain the regulations for this program, including the lenders' responsibilities.

(b) *Credit evaluation.* This is a key function of all lenders during the loan processing phase. The lender must analyze all credit factors associated with each proposed loan and apply its professional judgment to determine that the credit factors, considered in combination, ensure loan repayment. The lender must have an adequate underwriting process to ensure that loans are reviewed by other than the originating officer. There must be good credit documentation procedures.

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(c) *Environmental responsibilities.*

Lenders have a responsibility to become familiar with Federal environmental requirements; to consider, in consultation with the prospective borrower, the potential environmental impacts of their proposals at the earliest planning stages; and to develop proposals that minimize the potential to adversely impact the environment. Lenders must alert the Agency to any controversial environmental issues related to a proposed project or items that may require extensive environmental review. Lenders must help the borrower prepare Form FmHA 1940-20, "Request for Environmental Information" (when required by subpart G of part 1940 of this title); assist in the collection of additional data when the Agency needs such data to complete its environmental review of the proposal; and assist in the resolution of environmental problems.

(d) *Loan closing.* The lender will conduct loan closings.

### §§ 4279.31-4279.42 [Reserved]

### § 4279.43 Certified Lender Program.

(a) *General.* This section provides policies and procedures for the Certified Lender Program (CLP) for loans guaranteed under this part. The objectives are to expedite loan approval, making, and servicing.

(b) *CLP eligibility criteria.* The lender must meet established eligibility criteria as follows:

(1) Be an "eligible lender" as defined in 4279.29 of this subpart and authorized to do business in the State in which CLP status is desired.

(2) Demonstrate to the Agency's satisfaction that it has a thorough knowledge of commercial lending. The lender will demonstrate such knowledge by providing a summary of its guaranteed and unguaranteed business lending activity. At a minimum, the summary must include the dollar amount and number of loans in the lender's portfolio, unguaranteed and guaranteed by any Federal agency, with information on delinquencies and losses and, if applicable, the performance of the lender as a Small Business Administration (SBA) certified or preferred lender. A certified lender must be recognized

throughout the State as a commercial lender and have a track record of successfully making at least five commercial loans per year for at least the most recent 5 years, with delinquent commercial loans outstanding not exceeding 6 percent of commercial loans outstanding and historic losses not exceeding 6 percent of dollars loaned, or it must demonstrate that it has personnel with equivalent previous experience where the commercial loan portfolio was of a similar quantity and quality. The lender will provide a written certification to this effect along with a statistical analysis of its commercial loan portfolio for the last 3 of its fiscal years.

(3) The percentage of guarantee will not exceed 80 percent.

(4) If the lender is a bank or savings and loan, it must have a financial strength rating in the upper half of possible ratings as reported by a lender rating service selected by the Agency.

(5) Possess loan officers and other appropriate personnel who have received training conducted by the Agency. Additional training may be required if the lender's contact person changes or if the Agency determines further instruction is needed.

(6) Have committed no action within the most recent 2 years prior to requesting CLP status which would be considered cause for revoking CLP status under paragraph (e) of this section.

(c) *CLP approval.* The Agency may grant CLP status for a period not to exceed 5 years by executing Form 4279-8, "Certified Lender, Business and Industry Program," with the lender. CLP status will not apply to branches or suboffices of the lender unless so specified in the agreement. Such branches or suboffices may submit loans as regular lenders or apply for their own CLP status. Any lender who desires CLP status must prepare a written request to the State Director where it desires CLP status. The request must address each of the required criteria outlined in paragraph (b) of this section, except paragraph (b)(3), and should be accompanied by any other information the lender believes will be helpful. The request will also include Form 4279-8 completed and executed by the lender and an executed Lender's Agreement if

it does not already have a valid Lender's Agreement on file with the Agency. Loans made by the lender and guaranteed by the Agency prior to the lender receiving CLP status shall continue to be governed by the forms and agreements executed between the lender and the Agency for those loans.

(d) *Renewal of CLP status.* Renewal of CLP status is not automatic. CLP status will lapse upon the expiration date of Form 4279-8 unless the lender obtains a renewal. A lender whose CLP status has lapsed may continue to submit loan guarantee requests as a regular lender. A new Form 4279-8 completed and executed by the lender must be provided, along with a written update of the eligibility criteria required by this section for CLP approval. This information must be supplied at least 60 days prior to the expiration of the existing agreement to be assured of uninterrupted status. The information must address how the lender is complying with each of the required criteria described in paragraph (b) of this section. It must include any proposed changes in the designated persons for processing guaranteed loans or operating methods used in processing and servicing Agency guaranteed loans.

(e) *Revocation of CLP status.* The lender's CLP status may be revoked at any time for cause. The debarment of a lender is an additional alternative the Agency may consider. A lender which has lost its CLP status, but has not been debarred and still meets the requirements of §4279.29 of this subpart may continue to submit loan guarantee requests as a regular lender. Cause for revoking CLP status includes:

(1) Failure to maintain status as an eligible lender as set forth in §4279.29 of this subpart;

(2) Knowingly submitting false information when requesting a guarantee or basing a guarantee request on information known to be false or which the lender should have known to be false;

(3) Making a guaranteed loan with deficiencies which may cause losses not to be covered by the Loan Note Guarantee;

(4) Conviction for acts in connection with any loan transaction whether or not the loan was guaranteed by the Agency;



(5) Violation of usury laws in connection with any loan guaranteed by the Agency;

(6) Failure to obtain the required security for any loan guaranteed by the Agency;

(7) Using loan funds guaranteed by the Agency for purposes other than those specifically approved by the Agency in the Conditional Commitment;

(8) Violation of any term of the Lender's Agreement;

(9) Failure to correct any cited deficiency in loan documents in a timely manner;

(10) Failure to submit reports required by the Agency in a timely manner;

(11) Failure to process Agency guaranteed loans in a reasonably prudent manner;

(12) Failure to provide for adequate construction planning and monitoring in connection with any loan to ensure that the project will be completed with the available funds and, once completed, will be suitable for the borrower's needs;

(13) Repetitive recommendations for guaranteed loans with marginal or substandard credit quality or that do not comply with Agency requirements;

(14) Repetitive recommendations for servicing actions that do not comply with Agency requirements;

(15) Negligent servicing; or

(16) Failure to conduct any approved liquidation of a loan guaranteed by the Agency or its predecessors in a timely and effective manner and in accordance with the approved liquidation plan.

(f) *General loan processing and servicing guidelines.* All requests for guaranteed loans will be processed and serviced under subparts A and B of this part and subpart B of part 4287 of this chapter except as modified by this section. When determining whether or not to request a guarantee for a proposed loan, lenders must consider the priorities set forth in § 279.155 of subpart B of this part.

(1) Prior to processing an application, the CLP lender may give written notice to the State Director of its intention to submit an application. Upon receipt of such written notice, the Agency will notify the CLP lender whether

or not there is sufficient guarantee authority for the loan. Such guarantee authority will be held for 30 days pending receipt of the application. If a complete application for which guarantee authority is being held is not received within 30 days of the notice of intent to file or is rejected, the guarantee authority for this application will no longer be held in reserve. Notwithstanding the preceding, no guarantee authority will be held in reserve the last 60 days of the Agency's fiscal year.

(2) Refinancing of existing loan debt in accordance with § 4279.113(q) of subpart B of this part will not be permitted without prior Agency approval.

(3) CLP lenders will process all guaranteed loans as a "complete application" by obtaining and completing all items required by § 4279.161(b) of subpart B of this part. The CLP lender must maintain all information required by § 4279.161(b) in its loan file and determine that such material complies with all requirements.

(4) CLP lenders will make all material relating to any guarantee application available to the Agency upon request.

(5) At the time of the Agency's issuance of the Loan Note Guarantee, the CLP lender will provide the Agency with copies of the following documents:

(i) Executed Loan Agreement;

(ii) Executed Promissory Notes; and

(iii) Executed security documents including personal and corporate guarantees.

(g) *Unique characteristics of the CLP.* A proposed loan by a CLP lender requires a review by the Agency of the information submitted by the lender, plus satisfactory completion of the environmental review process by the Agency. The Agency may rely on the lender's credit analysis.

(1) The following will constitute a complete application submitted by a CLP lender:

(i) Form 4279–1, "Application for Loan Guarantee (Business and Industry)," (marked with the letters "CLP" at the top) completed in its entirety and executed by the borrower and CLP lender;

(ii) Copy of the proposed Loan Agreement or a list of proposed requirements;

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(iii) Form FmHA 1940-20, completed and signed, with attachments;

(iv) The lender's complete written analysis of the proposal, including spreadsheets of the balance sheets and income statements for the 3 previous years (for existing businesses), pro forma balance sheet at startup, and 2 years projected yearend balance sheets and income statements, with appropriate ratios and comparisons with industry standards (such as Dun & Bradstreet or Robert Morris Associates). All data must be shown in total dollars and also in common size form, obtained by expressing all balance sheet items as a percentage of assets and all income and expense items as a percentage of sales. The lender's credit analysis must include the borrower's management, repayment ability including a cash flow analysis, history of debt repayment, necessity of any debt refinancing, and the credit reports of the borrower, its principals, and any parent, affiliate, or subsidiary;

(v) Intergovernmental consultation comments in accordance with 7 CFR part 3015, subpart V; and

(vi) If the loan will exceed \$1 million and will increase direct employment by more than 50 employees, Form 4279-2, "Certification of Non-Relocation and Market Capacity Information Report," must be completed by the lender. For such loans, the Agency will submit Form 4279-2 to the Department of Labor and obtain clearance before a Conditional Commitment may be issued.

(2) The Agency will make the final credit decision based primarily on a review of the credit analysis submitted by the lender and approval of the Agency's completed environmental analysis, if required, except that refinancing of existing lender debt in accordance with § 4279.113(q) of subpart B of this part will not be approved without a credit analysis by the Agency of the borrower's complete financial statements; and completion by the Agency of the environmental analysis. The Agency may request such additional information as it determines is needed to make a decision.

(h) *Lender loan servicing responsibilities.* CLP lenders will be fully responsible for all aspects of loan servicing

and, if necessary, liquidation as described in subpart B of part 4287 of this chapter.

### **§ 4279.44 Access to records.**

The lender will permit representatives of the Agency (or other agencies of the United States) to inspect and make copies of any records of the lender pertaining to the Agency guaranteed loans during regular office hours of the lender or at any other time upon agreement between the lender and the Agency.

### **§§ 4279.45–4279.57 [Reserved]**

### **§ 4279.58 Equal Credit Opportunity Act.**

In accordance with title V of Public Law 93-495, the Equal Credit Opportunity Act, with respect to any aspect of a credit transaction, neither the lender nor the Agency will discriminate against any applicant on the basis of race, color, religion, national origin, sex, marital status or age (providing the applicant has the capacity to contract), or because all or part of the applicant's income derives from a public assistance program, or because the applicant has, in good faith, exercised any right under the Consumer Protection Act. The lender will comply with the requirements of the Equal Credit Opportunity Act as contained in the Federal Reserve Board's Regulation implementing that Act (see 12 CFR part 202). Such compliance will be accomplished prior to loan closing.

### **§ 4279.59 [Reserved]**

### **§ 4279.60 Civil Rights Impact Analysis.**

The Agency is responsible for ensuring that all requirements of FmHA Instruction 2006-P, "Civil Rights Impact Analysis" are met and will complete the appropriate level of review in accordance with that instruction.

### **§§ 4279.61–4279.70 [Reserved]**

### **§ 4279.71 Public bodies and nonprofit corporations.**

Any public body or nonprofit corporation that receives a guaranteed loan that meets the thresholds established by OMB Circulars A-128 or A-133 or successor regulations or circulars

must provide an audit in accordance with the applicable circular or regulation for the fiscal year (of the borrower) in which the Loan Note Guarantee is issued. If the loan is for development or purchases made in a previous fiscal year through interim financing, an audit will also be provided for the fiscal year in which the development or purchases occurred. Any audit provided by a public body or non-profit corporation in compliance with OMB Circulars A-128 or A-133 or their successors will be considered adequate to meet the audit requirements of the B&I program for that year.

**§ 4279.72 Conditions of guarantee.**

A loan guarantee under this part will be evidenced by a Loan Note Guarantee issued by the Agency. Each lender will execute a Lender's Agreement. If a valid Lender's Agreement already exists, it is not necessary to execute a new Lender's Agreement with each loan guarantee. The provisions of this part and part 4287 of this chapter will apply to all outstanding guarantees. In the event of a conflict between the guarantee documents and these regulations as they exist at the time the documents are executed, the regulations will control.

(a) *Full faith and credit.* A guarantee under this part constitutes an obligation supported by the full faith and credit of the United States and is incontestable except for fraud or misrepresentation of which a lender or holder has actual knowledge at the time it becomes such lender or holder or which a lender or holder participates in or condones. The guarantee will be unenforceable to the extent that any loss is occasioned by a provision for interest on interest. In addition, the guarantee will be unenforceable by the lender to the extent any loss is occasioned by the violation of usury laws, negligent servicing, or failure to obtain the required security regardless of the time at which the Agency acquires knowledge thereof. Any losses occasioned will be unenforceable to the extent that loan funds are used for purposes other than those specifically approved by the Agency in its Conditional Commitment. The Agency will guarantee payment as follows:

(1) To any holder, 100 percent of any loss sustained by the holder on the guaranteed portion of the loan and on interest due on such portion.

(2) To the lender, the lesser of:

(i) Any loss sustained by the lender on the guaranteed portion, including principal and interest evidenced by the notes or assumption agreements and secured advances for protection and preservation of collateral made with the Agency's authorization; or

(ii) The guaranteed principal advanced to or assumed by the borrower and any interest due thereon.

(b) *Rights and liabilities.* When a guaranteed portion of a loan is sold to a holder, the holder shall succeed to all rights of the lender under the Loan Note Guarantee to the extent of the portion purchased. The lender will remain bound to all obligations under the Loan Note Guarantee, Lender's Agreement, and the Agency program regulations. A guarantee and right to require purchase will be directly enforceable by a holder notwithstanding any fraud or misrepresentation by the lender or any unenforceability of the guarantee by the lender, except for fraud or misrepresentation of which the holder had actual knowledge at the time it became the holder or in which the holder participates or condones. The lender will reimburse the Agency for any payments the Agency makes to a holder of lender's guaranteed loan that, under the Loan Note Guarantee, would not have been paid to the lender had the lender retained the entire interest in the guaranteed loan and not conveyed an interest to a holder.

(c) *Payments.* A lender will receive all payments of principal and interest on account of the entire loan and will promptly remit to the holder its *pro rata* share thereof, determined according to its respective interest in the loan, less only the lender's servicing fee.

[61 FR 67633, Dec. 23, 1996, as amended at 76 FR 42470, July 19, 2011]

**§§ 4279.73–4279.74 [Reserved]**

**§ 4279.75 Sale or assignment of guaranteed loan.**

The lender may sell all or part of the guaranteed portion of the loan on the

secondary market or retain the entire loan. The lender shall not sell or participate any amount of the guaranteed or unguaranteed portion of the loan to the borrower or members of the borrower's immediate families, officers, directors, stockholders, other owners, or a parent, subsidiary or affiliate. If the lender desires to market all or part of the guaranteed portion of the loan at or subsequent to loan closing, such loan must not be in default. Loans made with the proceeds of any obligation the interest on which is excludable from income under 26 U.S.C. 103 (interest on State and local banks) or any successor section will not be guaranteed.

(a) *Single note system.* The entire loan is evidenced by one note, and one Loan Note Guarantee is issued. The lender may assign all or part of the guaranteed portion of the loan to one or more holders by using the Agency's Assignment Guarantee Agreement. The holder, upon written notice to the lender and the Agency, may reassign the unpaid guaranteed portion of the loan sold under the Assignment Guarantee Agreement. Upon notification and completion of the assignment through the use of Form 4279-6, the assignee shall succeed to all rights and obligations of the holder thereunder. If this option is selected, the lender may not at a later date cause any additional notes to be issued.

(b) *Multinote system.* Under this option the lender may provide one note for the unguaranteed portion of the loan and no more than 10 notes for the guaranteed portion. When this option is selected by the lender, the holder will receive one of the borrower's executed notes and a Loan Note Guarantee. The Agency will issue a Loan Note Guarantee for each note, including the unguaranteed note, to be attached to the note. An Assignment Guarantee Agreement will not be used when the multinote option is utilized.

(c) *After loan closing.* If a loan is closed using the multinote option and at a later date additional notes are desired, the lender may cause a series of new notes, so that the total number of notes issued does not exceed the total number provided for in paragraph (b) of this section, to be issued as replacement

for previously issued guaranteed notes, provided:

(1) Written approval of the Agency is obtained;

(2) The borrower agrees and executes the new notes;

(3) The interest rate does not exceed the interest rate in effect when the loan was closed;

(4) The maturity date of the loan is not changed;

(5) The Agency will not bear or guarantee any expenses that may be incurred in reference to such reissuances of notes;

(6) There is adequate collateral securing the notes;

(7) No intervening liens have arisen or have been perfected and the secured lien priority is better or remains the same; and

(8) All holders agree.

(d) *Termination of lender servicing fee.* The lender's servicing fee will stop when the Agency purchases the guaranteed portion of the loan from the secondary market. No such servicing fee may be charged to the Agency and all loan payments and collateral proceeds received will be applied first to the guaranteed loan and, when applied to the guaranteed loan, will be applied on a pro rata basis.

#### § 4279.76 Participation.

The lender may obtain participation in the loan under its normal operating procedures; however, the lender must retain title to the notes if any of them are unguaranteed and retain the lender's interest in the collateral.

#### § 4279.77 Minimum retention.

The lender is required to hold in its own portfolio a minimum of 5 percent of the total loan amount. The amount required to be maintained must be of the unguaranteed portion of the loan and cannot be participated to another. The lender may sell the remaining amount of the unguaranteed portion of the loan only through participation.

#### § 4279.78 Repurchase from holder.

(a) *Repurchase by lender.* A lender has the option to repurchase the unpaid guaranteed portion of the loan from a holder within 30 days of written demand by the holder when the borrower

is in default not less than 60 days on principal or interest due on the loan; or the lender has failed to remit to the holder its pro rata share of any payment made by the borrower within 30 days of the lender's receipt thereof. The repurchase by the lender will be for an amount equal to the unpaid guaranteed portion of principal and accrued interest less the lender's servicing fee. The holder must concurrently send a copy of the demand letter to the Agency. The guarantee will not cover the note interest to the holder on the guaranteed loan accruing after 90 days from the date of the demand letter to the lender requesting the repurchase. The lender will accept an assignment without recourse from the holder upon repurchase. The lender is encouraged to repurchase the loan to facilitate the accounting of funds, resolve the problem, and prevent default, where and when reasonable. The lender will notify the holder and the Agency of its decision.

(b) *Agency purchase.* (1) If the lender does not repurchase the unpaid guaranteed portion of the loan as provided in paragraph (a) of this section, the Agency will purchase from the holder the unpaid principal balance of the guaranteed portion together with accrued interest to date of repurchase, less the lender's servicing fee, within 30 days after written demand to the Agency from the holder. (This is in addition to the copy of the written demand on the lender.) The guarantee will not cover the note interest to the holder on the guaranteed loan accruing after 90 days from the date of the original demand letter of the holder to the lender requesting the repurchase.

(2) The holder's demand to the Agency must include a copy of the written demand made upon the lender. The holder must also include evidence of its right to require payment from the Agency. Such evidence will consist of either the original of the Loan Note Guarantee properly endorsed to the Agency or the original of the Assignment Guarantee Agreement properly assigned to the Agency without recourse including all rights, title, and interest in the loan. The holder must include in its demand the amount due including unpaid principal, unpaid in-

terest to date of demand, and interest subsequently accruing from date of demand to proposed payment date. The Agency will be subrogated to all rights of the holder.

(3) The Agency will notify the lender of its receipt of the holder's demand for payment. The lender must promptly provide the Agency with the information necessary for the Agency to determine the appropriate amount due the holder. Upon request by the Agency, the lender will furnish a current statement certified by an appropriate authorized officer of the lender of the unpaid principal and interest then owed by the borrower on the loan and the amount then owed to any holder. Any discrepancy between the amount claimed by the holder and the information submitted by the lender must be resolved between the lender and the holder before payment will be approved. Such conflict will suspend the running of the 30 day payment requirement.

(4) Purchase by the Agency neither changes, alters, nor modifies any of the lender's obligations to the Agency arising from the loan or guarantee nor does it waive any of Agency's rights against the lender. The Agency will have the right to set-off against the lender all rights inuring to the Agency as the holder of the instrument against the Agency's obligation to the lender under the guarantee.

(c) *Repurchase for servicing.* If, in the opinion of the lender, repurchase of the guaranteed portion of the loan is necessary to adequately service the loan, the holder must sell the guaranteed portion of the loan to the lender for an amount equal to the unpaid principal and interest on such portion less the lender's servicing fee. The guarantee will not cover the note interest to the holder on the guaranteed loan accruing after 90 days from the date of the demand letter of the lender or the Agency to the holder requesting the holder to tender its guaranteed portion. The lender must not repurchase from the holder for arbitrage or other purposes to further its own financial gain. Any repurchase must only be made after the lender obtains the Agency's written approval. If the lender does not repurchase the portion from the holder,

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the Agency may, at its option, purchase such guaranteed portion for servicing purposes.

### **§§ 4279.79–4279.83 [Reserved]**

#### **§ 4279.84 Replacement of document.**

(a) The Agency may issue a replacement Loan Note Guarantee or Assignment Guarantee Agreement which was lost, stolen, destroyed, mutilated, or defaced to the lender or holder upon receipt of an acceptable certificate of loss and an indemnity bond.

(b) When a Loan Note Guarantee or Assignment Guarantee Agreement is lost, stolen, destroyed, mutilated, or defaced while in the custody of the lender or holder, the lender will coordinate the activities of the party who seeks the replacement documents and will submit the required documents to the Agency for processing. The requirements for replacement are as follows:

(1) A certificate of loss, notarized and containing a jurat, which includes:

- (i) Name and address of owner;
- (ii) Name and address of the lender of record;
- (iii) Capacity of person certifying;
- (iv) Full identification of the Loan Note Guarantee or Assignment Guarantee Agreement including the name of the borrower, the Agency's case number, date of the Loan Note Guarantee or Assignment Guarantee Agreement, face amount of the evidence of debt purchased, date of evidence of debt, present balance of the loan, percentage of guarantee, and, if an Assignment Guarantee Agreement, the original named holder and the percentage of the guaranteed portion of the loan assigned to that holder. Any existing parts of the document to be replaced must be attached to the certificate;

(v) A full statement of circumstances of the loss, theft, or destruction of the Loan Note Guarantee or Assignment Guarantee Agreement; and

(vi) For the holder, evidence demonstrating current ownership of the Loan Note Guarantee and Note or the Assignment Guarantee Agreement. If the present holder is not the same as the original holder, a copy of the endorsement of each successive holder in the chain of transfer from the initial holder to present holder must be in-

cluded if in existence. If copies of the endorsement cannot be obtained, best available records of transfer must be submitted to the Agency (e.g., order confirmation, canceled checks, etc.).

(2) An indemnity bond acceptable to the Agency shall accompany the request for replacement except when the holder is the United States, a Federal Reserve Bank, a Federal corporation, a State or territory, or the District of Columbia. The bond shall be with surety except when the outstanding principal balance and accrued interest due the present holder is less than \$1 million verified by the lender in writing in a letter of certification of balance due. The surety shall be a qualified surety company holding a certificate of authority from the Secretary of the Treasury and listed in Treasury Department Circular 580.

(3) All indemnity bonds must be issued and payable to the United States of America acting through the USDA. The bond shall be in an amount not less than the unpaid principal and interest. The bond shall hold USDA harmless against any claim or demand which might arise or against any damage, loss, costs, or expenses which might be sustained or incurred by reasons of the loss or replacement of the instruments.

(4) In those cases where the guaranteed loan was closed under the provision of the multinode system, the Agency will not attempt to obtain, or participate in the obtaining of, replacement notes from the borrower. It will be the responsibility of the holder to bear costs of note replacement if the borrower agrees to issue a replacement instrument. Should such note be replaced, the terms of the note cannot be changed. If the evidence of debt has been lost, stolen, destroyed, mutilated or defaced, such evidence of debt must be replaced before the Agency will replace any instruments.

### **§§ 4279.85–4279.99 [Reserved]**

#### **§ 4279.100 OMB control number.**

The information collection requirements contained in this regulation have been approved by OMB and have been assigned OMB control number 0575–0171. Public reporting burden for

this collection of information is estimated to vary from 1 hour to 8 hours per response, with an average of 4 hours per response, including time for reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Department of Agriculture, Clearance Officer, OIRM, Stop 7630, Washington, D.C. 20250. You are not required to respond to this collection of information unless it displays a currently valid OMB control number.

## Subpart B—Business and Industry Loans

### § 4279.101 Introduction.

(a) *Content.* This subpart contains loan processing regulations for the Business and Industry (B&I) Guaranteed Loan Program. It is supplemented by subpart A of this part, which contains general guaranteed loan regulations, and subpart B of part 4287 of this chapter, which contains loan servicing regulations.

(b) *Purpose.* The purpose of the B&I Guaranteed Loan Program is to improve, develop, or finance business, industry, and employment and improve the economic and environmental climate in rural communities. This purpose is achieved by bolstering the existing private credit structure through the guarantee of quality loans which will provide lasting community benefits. It is not intended that the guarantee authority will be used for marginal or substandard loans or for relief of lenders having such loans.

(c) *Documents.* Copies of all forms, regulations, and Instructions referenced in this subpart are available in any Agency office.

### § 4279.102 Definitions.

The definitions and abbreviations in § 4279.2 of subpart A of this part are applicable to this subpart.

### §§ 4279.103 Exception authority.

Section 4279.15 of subpart A of this part applies to this subpart.

### § 4279.104 Appeals.

Section 4279.16 of subpart A of this part applies to this subpart.

### § 4279.105–4279.106 [Reserved]

### § 4279.107 Guarantee fees.

For all new loans there are two types of non-refundable guarantee fees to be paid by the lender. The fees may be passed on to the borrower. The fees may be forwarded to the Agency through an electronic funds transfer system or, at the Agency's discretion, by a check payable to USDA using a USDA-approved form.

(a) *Initial guarantee fee.* The initial fee is paid at the time the Loan Note Guarantee is issued. The fee may be included as an eligible loan purpose in the guaranteed loan. The fee will be the rate (a specified percentage not to exceed 2 percent) multiplied by the principal loan amount, multiplied by the percent of guarantee. Subject to specified annual limits set by the Agency, the initial guarantee fee may be reduced to 1 percent if the borrower's business supports value-added agriculture and results in farmers benefiting financially, or

(1) Is a high impact business development investment in accordance with § 4279.155(b)(5), and

(2) Is located in a rural community that:

(i) Is experiencing long-term population decline and job deterioration, or

(ii) Has remained persistently poor over the last 60 years, or

(iii) Is experiencing trauma as a result of natural disaster, or

(iv) Is experiencing fundamental structural changes in its economic base.

(b) *Annual renewal fee.* The annual renewal fee is paid once a year and is required to maintain the enforceability of the guarantee as to the lender.

(1) The rate of the annual renewal fee (a specified percentage) is established by Rural Development in an annual notice published in the FEDERAL REGISTER, multiplied by the outstanding principal loan balance as of December 31 of each year, multiplied by the percent of guarantee. The rate is the rate

in effect at the time the loan is obligated, and will remain in effect for the life of the loan.

(2) Annual renewal fees are due on January 31. Payments not received by April 1 are considered delinquent and, at the Agency's discretion, may result in cancellation of the guarantee to the lender. Holders' rights will continue in effect as specified in the Loan Note Guarantee and Assignment Guarantee Agreement. Any delinquent annual renewal fees will bear interest at the note rate and will be deducted from any loss payment due the lender. For loans where the Loan Note Guarantee is issued between October 1 and December 31, the first annual renewal fee payment will be due January 31 of the second year following the date the Loan Note Guarantee was issued.

[70 FR 57486, Oct. 3, 2005]

#### § 4279.108 Eligible borrowers.

(a) *Type of entity.* A borrower may be a cooperative organization, corporation, partnership, or other legal entity organized and operated on a profit or nonprofit basis; an Indian tribe on a Federal or State reservation or other Federally recognized tribal group; a public body; or an individual. A cooperative organization is a cooperative or an entity, not chartered as a cooperative, that operates as a cooperative in that it is owned and operated for the benefit of its members, including the manner in which it distributes its dividends and assets. A borrower must be engaged in or proposing to engage in a business. Business may include manufacturing, wholesaling, retailing, providing services, or other activities that will:

- (1) Provide employment;
- (2) Improve the economic or environmental climate;
- (3) Promote the conservation, development, and use of water for aquaculture; or
- (4) Reduce reliance on nonrenewable energy resources by encouraging the development and construction of solar energy systems and other renewable energy systems (including wind energy systems, geothermal energy systems, and anaerobic digesters for the purpose of energy generation).

(b) *Citizenship.* Individual borrowers must be citizens of the United States (U.S.) or reside in the U.S. after being legally admitted for permanent residence. Citizens and residents of the Republic of Palau, the Federated States of Micronesia, and the Republic of the Marshall Islands shall be considered U.S. citizens. Corporations or other nonpublic body organization-type borrowers must be at least 51 percent owned by persons who are either citizens of the U.S. or reside in the U.S. after being legally admitted for permanent residence.

(c) *Rural area.* The business financed with a B&I Guaranteed Loan must be located in a rural area, except for cooperative organizations financed in accordance with paragraph (d)(3) of this section. Loans to borrowers with facilities located in both rural and non-rural areas will be limited to the amount necessary to finance the facility in the eligible rural area, except for cooperative organizations financed in accordance with paragraph (d)(3) of this section. Rural areas are any areas other than:

(1) A city or town that has a population of greater than 50,000 inhabitants; and

(2) The urbanized area contiguous and adjacent to such a city or town, as defined by the U.S. Bureau of the Census using the latest decennial census of the United States.

(d) *Loans to cooperative organizations.*

(1) B&I loans to eligible cooperative organizations may be made in principal amounts up to \$40 million if the project is located in a rural area, the cooperative facility being financed provides for the value-added processing of agricultural commodities, and the total amount of loans exceeding \$25 million does not exceed 10 percent of the funds available for the fiscal year.

(2) Cooperative organizations that are headquartered in a non-rural area may be eligible for a B&I loan if the loan is used for a project or venture that is located in a rural area.

(3) B&I loans to eligible cooperative organizations may also be made in non-rural areas provided:

(i) The primary purpose of the loan is for a facility to provide value-added processing for agricultural producers



that are located within 80 miles of the facility;

(ii) The applicant satisfactorily demonstrates that the primary benefit of the loan will be to provide employment for rural residents;

(iii) The principal amount of the loan does not exceed \$25 million; and

(iv) The total amount of loans guaranteed under this section does not exceed 10 percent of the funds available for the fiscal year.

(4) An eligible cooperative organization may refinance an existing B&I loan provided that the existing loan is current and performing, the existing loan is not and has not been in payment default (more than 30 days late) or the collateral of which has not been converted, and there is adequate security or full collateral for the new B&I loan.

(e) *Other credit.* All applications for assistance will be accepted and processed without regard to the availability of credit from any other source.

[61 FR 67633, Dec. 23, 1996, as amended at 67 FR 78130, Dec. 23, 2002; 69 FR 64830, Nov. 9, 2004]

**§§ 4279.109–4279.112 [Reserved]**

**§ 4279.113 Eligible loan purposes.**

Loan purposes must be consistent with the general purpose contained in § 4279.101 of this subpart. They include but are not limited to the following:

(a) Business and industrial acquisitions when the loan will keep the business from closing, prevent the loss of employment opportunities, or provide expanded job opportunities.

(b) Business conversion, enlargement, repair, modernization, or development.

(c) Purchase and development of land, easements, rights-of-way, buildings, or facilities.

(d) Purchase of equipment, leasehold improvements, machinery, supplies, or inventory.

(e) Pollution control and abatement.

(f) Transportation services incidental to industrial development.

(g) Startup costs and working capital.

(h) Agricultural production, when not eligible for Farm Service Agency (FSA) farmer program assistance and when it is part of an integrated busi-

ness also involved in the processing of agricultural products.

(1) Examples of potentially eligible production include but are not limited to: An apple orchard in conjunction with a food processing plant; poultry buildings linked to a meat processing operation; or sugar beet production coupled with storage and processing. Any agricultural production considered for B&I financing must be owned, operated, and maintained by the business receiving the loan for which a guarantee is provided. Independent agricultural production operations, even if not eligible for FSA farmer programs assistance, are not eligible for the B&I program.

(2) The agricultural-production portion of any loan will not exceed 50 percent of the total loan or \$1 million, whichever is less.

(i) Purchase of membership, stocks, bonds, or debentures necessary to obtain a loan from Farm Credit System institutions and other lenders provided that the purchase is required for all of their borrowers.

(j) Purchase of cooperative stock by individual farmers or ranchers in a farmer or rancher cooperative established for the purpose of processing an agricultural commodity.

(1) The cooperative may contract for services to process agricultural commodities or otherwise process value-added agricultural products during the 5-year period beginning on the operation startup date of the cooperative in order to provide adequate time for the planning and construction of the processing facility of the cooperative.

(2) Notwithstanding §§ 4279.131(d) and 4279.137, the individual farmer or rancher may provide financial information in the manner that is generally required by commercial agricultural lenders in order to obtain a loan.

(k) Aquaculture, including conservation, development, and utilization of water for aquaculture.

(l) Commercial fishing.

(m) Commercial nurseries engaged in the production of ornamental plants and trees and other nursery products such as bulbs, flowers, shrubbery, flower and vegetable seeds, sod, and the growing of plants from seed to the transplant stage.

(n) Forestry, which includes businesses primarily engaged in the operation of timber tracts, tree farms, and forest nurseries and related activities such as reforestation.

(o) The growing of mushrooms or hydroponics.

(p) Interest (including interest on interim financing) during the period before the first principal payment becomes due or when the facility becomes income producing, whichever is earlier.

(q) Feasibility studies.

(r) To refinance outstanding debt when it is determined that the project is viable and refinancing is necessary to improve cash flow and create new or save existing jobs. Except as provided for in §4279.108(d)(4) of this subpart, existing lender debt may be included provided that, at the time of application, the loan has been current for at least the past 12 months (unless such status is achieved by the lender forgiving the borrower's debt) and the lender is providing better rates or terms. Subordinated owner debt is not eligible under this paragraph. Unless the amount to be refinanced is owed directly to the Federal government or is federally guaranteed, the existing lender debt refinancing must be a secondary part (less than 50 percent) of the overall loan.

(s) Takeout of interim financing. Guaranteeing a loan after project completion to pay off a lender's interim loan will not be treated as debt refinancing provided that the lender submits a complete preapplication or application which proposes such interim financing prior to completing the interim loan. A lender that is considering an interim loan should be advised that the Agency assumes no responsibility or obligation for interim loans advanced prior to the Conditional Commitment being issued.

(t) Fees and charges for professional services and routine lender fees.

(u) Agency guarantee fee.

(v) Tourist and recreation facilities, including hotels, motels, and bed and breakfast establishments, except as prohibited under ineligible purposes.

(w) Educational or training facilities.

(x) Community facility projects which are not listed as an ineligible

loan purpose such as convention centers.

(y) Constructing or equipping facilities for lease to private businesses engaged in commercial or industrial operations.

(z) The financing of housing development sites provided that the community demonstrates a need for additional housing to prevent a loss of jobs in the area or to house families moving to the area as a result of new employment opportunities.

(aa) Community antenna television services or facilities.

(bb) Provide loan guarantees to assist industries adjusting to terminated Federal agricultural programs or increased foreign competition.

(cc) *To finance energy projects.* Commercially available energy projects that produce biomass fuel or biogas as an output must have completed two operating cycles at design performance levels submitted to the Agency. Projects that produce steam or electricity as an output must have met or exceeded acceptance test performance criteria submitted to the Agency and be successfully interconnected with the purchaser of the output. Performance or acceptance test requirements for all other energy projects will be determined by the Agency on a case by case basis. Financing for energy projects will only be allowed when the facility has been constructed according to plans and specifications and is producing at the quality and quantity projected in the application.

[61 FR 67633, Dec. 23, 1996, as amended at 69 FR 64831, Nov. 9, 2004; 71 FR 33189, June 8, 2006; 72 FR 12705, Mar. 19, 2007]

#### §4279.114 Ineligible purposes.

(a) Distribution or payment to an individual owner, partner, stockholder, or beneficiary of the borrower or a close relative of such an individual when such individual will retain any portion of the ownership of the borrower.

(b) Projects in excess of \$1 million that would likely result in the transfer of jobs from one area to another and increase direct employment by more than 50 employees.

(c) Projects in excess of \$1 million that would increase direct employment

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by more than 50 employees, if the project would result in an increase in the production of goods for which there is not sufficient demand, or if the availability of services or facilities is insufficient to meet the needs of the business.

(d) Charitable institutions, churches, or church-controlled or fraternal organizations.

(e) Lending and investment institutions and insurance companies.

(f) Assistance to Government employees and military personnel who are directors or officers or have a major ownership of 20 percent or more in the business.

(g) Racetracks for the conduct of races by professional drivers, jockeys, etc., where individual prizes are awarded in the amount of \$500 or more.

(h) Any business that derives more than 10 percent of annual gross revenue from gambling activity.

(i) Any illegal business activity.

(j) Prostitution.

(k) Any line of credit.

(l) The guarantee of lease payments.

(m) The guarantee of loans made by other Federal agencies.

(n) Owner-occupied housing. Bed and breakfasts, storage facilities, et al, are allowed when the pro rata value of the owner's living quarters is deleted.

(o) Projects that are eligible for the Rural Rental Housing and Rural Cooperative Housing loans under sections 515, 521, and 538 of the Housing Act of 1949, as amended.

(p) Loans made with the proceeds of any obligation the interest on which is excludable from income under 26 U.S.C. 103 or a successor statute. Funds generated through the issuance of tax-exempt obligations may neither be used to purchase the guaranteed portion of any Agency guaranteed loan nor may an Agency guaranteed loan serve as collateral for a tax-exempt issue. The Agency may guarantee a loan for a project which involves tax-exempt financing only when the guaranteed loan funds are used to finance a part of the project that is separate and distinct from the part which is financed by the tax-exempt obligation, and the guaranteed loan has at least a parity security position with the tax-exempt obligation.

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(q) The guarantee of loans where there may be, directly or indirectly, a conflict of interest or an appearance of a conflict of interest involving any action by the Agency.

(r) Golf courses.

### § 4279.115 Prohibition under Agency programs.

No B&I loans guaranteed by the Agency will be conditioned on any requirement that the recipients of such assistance accept or receive electric service from any particular utility, supplier, or cooperative.

### §§ 4279.116-4279.118 [Reserved]

### § 4279.119 Loan guarantee limits.

(a) *Loan amount.* The total amount of Agency loans to one borrower, including: The guaranteed and unguaranteed portions; the outstanding principal and interest balance of any existing Agency guaranteed loans; and new loan request, must not exceed \$10 million, except as outlined in paragraphs (a)(1) and (2) of this section.

(1) The Administrator may, at the Administrator's discretion, grant an exception to the \$10 million limit for loans of \$25 million or less under the following circumstances:

(i) The project to be financed is a high-priority project. Priority will be determined in accordance with the criteria contained in § 4279.155 of this subpart;

(ii) The lender must document to the satisfaction of the Agency that the loan will not be made and the project will not be completed if the guarantee is not approved;

(iii) The percentage of guarantee will not exceed 60 percent. No exception to this requirement will be approved under paragraph (b) of this section for loans exceeding \$10 million; and

(iv) Any request for a guaranteed loan exceeding the \$10 million limit must be submitted to the Agency in the form of a preapplication. The preapplication must be submitted to the National Office for review and concurrence before encouraging a full application.

(2) The Secretary, whose authority may not be redelegated, may approve

guaranteed loans in excess of \$25 million, at the Secretary's discretion, for rural cooperative organizations that process value-added agricultural commodities in accordance with § 4279.108(d)(1) of this subpart.

(b) *Percent of guarantee.* The percentage of guarantee, up to the maximum allowed by this section, is a matter of negotiation between the lender and the Agency. The maximum percentage of guarantee is 80 percent for loans of \$5 million or less, 70 percent for loans between \$5 and \$10 million, and 60 percent for loans exceeding \$10 million. Notwithstanding the preceding, the Administrator may, at the Administrator's discretion, grant an exception allowing guarantees of up to 90 percent on loans of \$10 million or less under the following circumstances:

(1) The project to be financed is a high-priority project. Priority will be determined in accordance with the criteria contained in 4279.155 of this subpart;

(2) The lender must document to the satisfaction of the Agency that the loan will not be made and the project will not be completed if the higher guarantee percentage is not approved; and

(3) The State Director may grant an exception for loans of up to 90 percent on loans of \$2 million or less subject to the State Director's delegated loan authority and meeting all of the conditions as set forth in this section. In cases where the State Director does not have the loan approval authority to approve a loan of \$2 million or less or the proposed percentage, the case must be submitted to the National Office for review.

(4) Each fiscal year, the Agency will establish a limit on the maximum portion of guarantee authority available for that fiscal year that may be used to guarantee loans with a guarantee percentage exceeding 80 percent. The limit will be announced by publishing a notice in the FEDERAL REGISTER. Once the limit has been reached, the guarantee percentage for all additional loans guaranteed during the remainder of that fiscal year will not exceed 80 percent.

[61 FR 67633, Dec. 23, 1996, as amended at 69 FR 64831, Nov. 9, 2004]

#### § 4279.120 Fees and charges.

(a) *Routine lender fees.* The lender may establish charges and fees for the loan provided they are similar to those normally charged other applicants for the same type of loan in the ordinary course of business.

(b) *Professional services.* Professional services are those rendered by entities generally licensed or certified by States or accreditation associations, such as architects, engineers, packagers, accountants, attorneys, or appraisers. The borrower may pay fees for professional services needed for planning and developing a project provided that the amounts are reasonable and customary in the area. Professional fees may be included as an eligible use of loan proceeds.

#### §§ 4279.121–4279.124 [Reserved]

#### § 4279.125 Interest rates.

The interest rate for the guaranteed loan will be negotiated between the lender and the applicant and may be either fixed or variable as long as it is a legal rate. Interest rates will not be more than those rates customarily charged borrowers in similar circumstances in the ordinary course of business and are subject to Agency review and approval. Lenders are encouraged to utilize the secondary market and pass interest-rate savings on to the borrower.

(a) A variable interest rate agreed to by the lender and borrower must be a rate that is tied to a base rate agreed to by the lender and the Agency. The variable interest rate may be adjusted at different intervals during the term of the loan, but the adjustments may not be more often than quarterly and must be specified in the Loan Agreement. The lender must incorporate, within the variable rate Promissory Note at loan closing, the provision for adjustment of payment installments coincident with an interest-rate adjustment. The lender will ensure that the outstanding principal balance is properly amortized within the prescribed loan maturity to eliminate the possibility of a balloon payment at the end of the loan.

(b) Any change in the interest rate between the date of issuance of the

Conditional Commitment and before the issuance of the Loan Note Guarantee must be approved in writing by the Agency approval official. Approval of such a change will be shown as an amendment to the Conditional Commitment.

(c) It is permissible to have one interest rate on the guaranteed portion of the loan and another rate on the unguaranteed portion of the loan provided that the rate on the guaranteed portion does not exceed the rate on the unguaranteed portion.

(d) A combination of fixed and variable rates will be allowed.

**§ 4279.126 Loan terms.**

(a) The maximum repayment for loans on real estate will not exceed 30 years; machinery and equipment repayment will not exceed the useful life of the machinery and equipment purchased with loan funds or 15 years, whichever is less; and working capital repayment will not exceed 7 years. The term for a loan that is being refinanced may be based on the collateral the lender will take to secure the loan.

(b) The first installment of principal and interest will, if possible, be scheduled for payment after the project is operational and has begun to generate income. However, the first full installment must be due and payable within 3 years from the date of the Promissory Note and be paid at least annually thereafter. Interest-only payments will be paid at least annually from the date of the note.

(c) Only loans which require a periodic payment schedule which will retire the debt over the term of the loan without a balloon payment will be guaranteed.

(d) A loan's maturity will take into consideration the use of proceeds, the useful life of assets being financed, and the borrower's ability to repay the loan. The lender may apply the maximum guidelines specified above only when the loan cannot be repaid over a shorter term.

(e) All loans guaranteed through the B&I program must be sound, with reasonably assured repayment.

**§§ 4279.127–4279.130 [Reserved]**

**§ 4279.131 Credit quality.**

The lender is primarily responsible for determining credit quality and must address all of the elements of credit quality in a written credit analysis including adequacy of equity, cash flow, collateral, history, management, and the current status of the industry for which credit is to be extended.

(a) *Cash flow.* All efforts will be made to structure or restructure debt so that the business has adequate debt coverage and the ability to accommodate expansion.

(b) *Collateral.* (1) Collateral must have documented value sufficient to protect the interest of the lender and the Agency and, except as set forth in paragraph (b)(2) of this section, the discounted collateral value will be at least equal to the loan amount. Lenders will discount collateral consistent with sound loan-to-value policy.

(2) Some businesses are predominantly cash-flow oriented, and where cash flow and profitability are strong, loan-to-value coverage may be discounted accordingly. A loan primarily based on cash flow must be supported by a successful and documented financial history.

(c) *Industry.* Current status of the industry will be considered and businesses in areas of decline will be required to provide strong business plans which outline how they differ from the current trends. The regulatory environment surrounding the particular business or industry will be considered.

(d) *Equity.* (1) A minimum of 10 percent tangible balance sheet equity will be required for existing businesses at loan closing. A minimum of 20 percent tangible balance sheet equity will be required for new businesses at loan closing. For energy projects, the minimum tangible balance sheet equity requirement range will be between 25 percent and 40 percent. Criteria for considering the minimum equity required for an individual application will be based on: existing businesses with successful financial and management history vs. start-up businesses; personal/corporate guarantees offered; contractual relationships with suppliers and buyers;

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credit rating; and strength of the business plan/feasibility study. Where the application is a request to refinance outstanding Federal direct or guaranteed loans, without any new financing, the equity requirement may be determined using adjusted tangible net worth. An application that combines a refinancing guarantee request with a new loan guarantee request is subject to the standard, unadjusted, equity requirement except as provided in paragraphs (d)(1)(i) or (d)(1)(ii) of this section. Increases or decreases in the equity requirements may be imposed or granted as follows:

(i) A reduction in the equity requirement for existing businesses may be permitted by the Administrator. In order for a reduction to be considered, the borrower must furnish the following:

(A) Collateralized personal and corporate guarantees, including any parent, subsidiary, or affiliated company, when feasible and legally permissible (in accordance with § 4279.149 of this subpart), and

(B) Pro forma and historical financial statements that indicate the business to be financed meets or exceeds the median quartile (as identified in the Risk Management Association's Annual Statement Studies or similar publication) for the current ratio, quick ratio, debt-to-worth ratio, debt coverage ratio, and working capital.

(ii) The approval official may require more than the minimum equity requirements provided in this paragraph if the official makes a written determination that special circumstances necessitate this course of action.

(2) The equity requirement must be met in the form of either cash or tangible earning assets contributed to the business and reflected on the balance sheet.

(3) The lender must certify that the equity requirement was determined using balance sheets prepared in accordance with GAAP and met upon giving effect to the entirety of the loan in the calculation, whether or not the loan itself is fully advanced, as of the date the guaranteed loan is closed.

(e) *Lien priorities.* The entire loan will be secured by the same security with equal lien priority for the guaranteed

and unguaranteed portions of the loan. The unguaranteed portion of the loan will neither be paid first nor given any preference or priority over the guaranteed portion. A parity or junior position may be considered provided that discounted collateral values are adequate to secure the loan in accordance with paragraph (b) of this section after considering prior liens.

(f) *Management.* A thorough review of key management personnel will be completed to ensure that the business has adequately trained and experienced managers.

[61 FR 67633, Dec. 23, 1996, as amended at 71 FR 33189, June 8, 2006]

### §§ 4279.132–4279.136 [Reserved]

### § 4279.137 Financial statements.

(a) The lender will determine the type and frequency of submission of financial statements by the borrower. At a minimum, annual financial statements prepared by an accountant in accordance with Generally Accepted Accounting Principles will be required.

(b) If specific circumstances warrant and the proposed guaranteed loan will exceed \$3 million, the Agency may require annual audited financial statements. For example, the need for audited financial statements will be carefully considered in connection with loans that depend heavily on inventory and accounts receivable for collateral.

### §§ 4279.138–4279.142 [Reserved]

### § 4279.143 Insurance.

(a) *Hazard.* Hazard insurance with a standard mortgage clause naming the lender as beneficiary will be required on every loan in an amount that is at least the lesser of the depreciated replacement value of the collateral or the amount of the loan. Hazard insurance includes fire, windstorm, lightning, hail, explosion, riot, civil commotion, aircraft, vehicle, marine, smoke, builder's risk during construction by the business, and property damage.

(b) *Life.* The lender may require life insurance to insure against the risk of death of persons critical to the success of the business. When required, coverage will be in amounts necessary to provide for management succession or

to protect the business. The cost of insurance and its effect on the applicant's working capital must be considered as well as the amount of existing insurance which could be assigned without requiring additional expense.

(c) *Worker compensation.* Worker compensation insurance is required in accordance with State law.

(d) *Flood.* National flood insurance is required in accordance with 7 CFR, part 1806, subpart B (FmHA Instruction 426.2, available in any field office or the National Office).

(e) *Other.* Public liability, business interruption, malpractice, and other insurance appropriate to the borrower's particular business and circumstances will be considered and required when needed to protect the interests of the borrower.

**§ 4279.144 Appraisals.**

Lenders will be responsible for ensuring that appraisal values adequately reflect the actual value of the collateral. All real property appraisals associated with Agency guaranteed loanmaking and servicing transactions will meet the requirements contained in the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) of 1989 and the appropriate guidelines contained in Standards 1 and 2 of the Uniform Standards of Professional Appraisal Practices (USPAP). In accordance with USPAP, the Agency will require documentation that the appraiser has the necessary experience and competency to appraise the property in question. All appraisals will include consideration of the potential effects from a release of hazardous substances or petroleum products or other environmental hazards on the market value of the collateral. For additional guidance and information concerning the completion of real property appraisals, refer to "Standard Practices for Environmental Site Assessments: Transaction Screen Questionnaire" and "Phase I Environmental Site Assessment," both published by the American Society of Testing and Materials. Chatels will be evaluated in accordance with normal banking practices and generally accepted methods of determining value.

[69 FR 64831, Nov. 9, 2004]

**§§ 4279.145–4279.148 [Reserved]**

**§ 4279.149 Personal and corporate guarantee.**

(a) Unconditional personal and corporate guarantees are part of the collateral for the loan, but are not considered in determining whether a loan is adequately secured for loanmaking purposes. Agency approved personal and corporate guarantees for the full term of the loan and at least equal to the guarantor's percent interest in the borrower, times the loan amount are required from those owning at least a 20 percent interest in the borrower, unless the lender documents to the Agency's satisfaction that collateral, equity, cashflow, and profitability indicate an above-average ability to repay the loan. The guarantors will execute an Agency approved unconditional guarantee form. When warranted by an Agency assessment of potential financial risk, Agency approved guarantees may also be required of parent, subsidiaries, or affiliated companies (owning less than a 20 percent interest in the borrower) and require security for any guarantee provided under this section.

(b) Exceptions to the requirement for personal guarantees must be requested by the lender and concurred by the Agency approval official on a case-by-case basis. The lender must document that collateral, equity, cashflow, and profitability indicate an above-average ability to repay the loan.

[71 FR 67033, Nov. 20, 2006; 72 FR 27241, May 15, 2007]

**§ 4279.150 Feasibility studies.**

A feasibility study by a qualified independent consultant may be required by the Agency for start-up businesses or existing businesses when the project will significantly affect the borrower's operations. An acceptable feasibility study should include, but not be limited to, economic, market, technical, financial, and management feasibility.

**§§ 4279.151–4279.154 [Reserved]**

**§ 4279.155 Loan priorities.**

Applications and preapplications received by the Agency will be considered in the order received; however, for

the purpose of assigning priorities as described in paragraph (b) of this section, the Agency will compare an application to other pending applications.

(a) When applications on hand otherwise have equal priority, applications for loans from qualified veterans will have preference.

(b) Priorities will be assigned by the Agency to eligible applications on the basis of a point system as contained in this section. The application and supporting information will be used to determine an eligible proposed project's priority for available guarantee authority. All lenders, including CLP lenders, will consider Agency priorities when choosing projects for guarantee. The lender will provide necessary information related to determining the score, as requested.

(1) *Population priority.* Projects located in an unincorporated area or in a city with under 25,000 population (10 points).

(2) *Community priority.* The priority score for community will be the total score for the following categories:

(i) Located in an eligible area of long term population decline and job deterioration based on reliable statistical data (5 points).

(ii) Located in a rural community that has remained persistently poor over the last 60 years (5 points).

(iii) Located in a rural community that is experiencing trauma as a result of natural disaster or experiencing fundamental structural changes in its economic base (5 points).

(iv) Located in a city or county with an unemployment rate 125 percent of the statewide rate or greater (5 points).

(3) *Empowerment Zone/Enterprise Community (EZ/EC).* (i) Located in an EZ/EC designated area (10 points).

(ii) Located in a designated Champion Community (5 points). A Champion Community is a community which developed a strategic plan to apply for an EZ/EC designation, but not selected as a designated EZ/EC Community.

(4) *Loan features.* The priority score for loan features will be the total score for the following categories:

(i) Lender will price the loan at the Wall Street Journal published Prime Rate plus 1.5 percent or less (5 points).

(ii) Lender will price the loan at the Wall Street Journal published Prime Rate plus 1 percent or less (5 points).

(iii) The Agency guaranteed loan is less than 50 percent of project cost (5 points).

(iv) Percentage of guarantee is 10 or more percentage points less than the maximum allowable for a loan of its size (5 points).

(5) *High impact business investment priorities.* The priority score for high impact business investment will be the total score for the following three categories:

(i) *Industry.* The priority score for industry will be the total score for the following, except that the total score for industry cannot exceed 10 points.

(A) Industry that has 20 percent or more of its sales in international markets (5 points).

(B) Industry that is not already present in the community (5 points).

(ii) *Business.* The priority score for business will be the total score for the following:

(A) Business that offers high value, specialized products and services that command high prices (2 points).

(B) Business that provides an additional market for existing local business (3 points).

(C) Business that is locally owned and managed (3 points).

(D) Business that will produce a natural resource value-added product (2 points).

(iii) *Occupations.* The priority score for occupations will be the total score for the following, except that the total score for job quality cannot exceed 10 points:

(A) Business that creates jobs with an average wage exceeding 125 percent of the Federal minimum wage (5 points).

(B) Business that creates jobs with an average wage exceeding 150 percent of the Federal minimum wage (10 points).

(6) *Administrative points.* The State Director may assign up to 10 additional points to an application to account for such factors as statewide distribution of funds, natural or economic emergency conditions, or area economic development strategies. An explanation of the assigning of these points by the



State Director will be appended to the calculation of the project score maintained in the case file. If an application is considered in the National Office, the Administrator may also assign up to an additional 10 points. The Administrator may assign the additional points to an application to account for items such as geographic distribution of funds and emergency conditions caused by economic problems or natural disasters.

**§ 4279.156 Planning and performing development.**

(a) *Design policy.* The lender must ensure that all project facilities must be designed utilizing accepted architectural and engineering practices and must conform to applicable Federal, state, and local codes and requirements. The lender will also ensure that the project will be completed using the available funds and, once completed, will be used for its intended purpose and produce products in the quality and quantity proposed in the completed application approved by the Agency.

(b) *Project control.* The lender will monitor the progress of construction and undertake the reviews and inspections necessary to ensure that construction conforms with applicable Federal, state, and local code requirements; proceeds are used in accordance with the approved plans, specifications, and contract documents; and that funds are used for eligible project costs.

(c) *Equal opportunity.* For all construction contracts in excess of \$10,000, the contractor must comply with Executive Order 11246, entitled "Equal Employment Opportunity," as amended by Executive Order 11375, and as supplemented by applicable Department of Labor regulations (41 CFR, part 60). The borrower and lender are responsible for ensuring that the contractor complies with these requirements.

(d) *Americans with Disabilities Act (ADA).* B&I Guaranteed Loans which involve the construction of or addition to facilities that accommodate the public and commercial facilities, as defined by the ADA, must comply with the ADA. The lender and borrower are responsible for compliance.

**§§ 4279.157–4279.160 [Reserved]**

**§ 4279.161 Filing preapplications and applications.**

Borrowers and lenders are encouraged to file preapplications and obtain Agency comments before completing an application. However, if they prefer, they may file a complete application as the first contact with the Agency. Neither preapplications nor applications will be accepted or processed unless a lender has agreed to finance the proposal. Guaranteed loans of \$600,000 and less may be processed under paragraph (b) or (c) of this section, but guaranteed loans exceeding \$600,000 must be processed under paragraph (b) of this section.

(a) *Preapplications.* Lenders may file preapplications by submitting the following to the Agency:

(1) A letter signed by the borrower and lender containing the following:

(i) Borrower's name, organization type, address, contact person, and federal tax identification and telephone numbers.

(ii) Amount of the loan request, percent of guarantee requested, and the proposed rates and terms.

(iii) Name of the proposed lender, address, telephone number, contact person, and lender's Internal Revenue Service (IRS) identification number.

(iv) Brief description of the project, products, services provided, and availability of raw materials and supplies.

(v) Type and number of jobs created or saved.

(vi) Amount of borrower's equity and a description of collateral, with estimated values, to be offered as security for the loan.

(vii) If a corporate borrower, the names and addresses of the borrower's parent, affiliates, and subsidiary firms, if any, and a description of the relationship.

(2) A completed Form 4279-2, "Certification of Non-Relocation and Market Capacity Information Report," if the proposed loan is in excess of \$1 million and will increase direct employment by more than 50 employees.

(3) For existing businesses, a current balance sheet and a profit and loss statement not more than 90 days old

and financial statements for the borrower and any parent, affiliates, and subsidiaries for at least the 3 most recent years.

(4) For start-up businesses, a preliminary business plan must be provided.

(b) *Applications.* Except for CLP lenders, applications will be filed with the Agency by submitting the following information: (CLP applications will be completed in accordance with 4279.43(g)(1) but CLP lenders must have the material listed in this paragraph in their files.)

(1) A completed Form 4279-1, "Application for Loan Guarantee (Business and Industry)".

(2) The information required for filing a preapplication, as listed above, if not previously filed or if the information has changed.

(3) Form FmHA 1940-20, "Request for Environmental Information," and attachments, unless the project is categorically excluded under Agency environmental regulations.

(4) A personal credit report from an acceptable credit reporting company for a proprietor (owner), each partner, officer, director, key employee, and stockholder owning 20 percent or more interest in the applicant, except for those corporations listed on a major stock exchange. Credit reports are not required for elected and appointed officials when the applicant is a public body.

(5) Intergovernmental consultation comments in accordance with 7 CFR, part 3015, subpart V.

(6) Appraisals, accompanied by a copy of the appropriate environmental site assessment, if available. (Agency approval in the form of a Conditional Commitment may be issued subject to receipt of adequate appraisals.)

(7) For all businesses, a current (not more than 90 days old) balance sheet, a *pro forma* balance sheet at startup, and projected balance sheets, income and expense statements, and cash flow statements for the next 2 years. Projections should be supported by a list of assumptions showing the basis for the projections.

(8) Lender's complete written analysis, including spreadsheets of the balance sheets and income statements for the 3 previous years (for existing busi-

nesses), *pro forma* balance sheet at startup, and 2 years projected yearend balance sheets and income statements, with appropriate ratios and comparisons with industrial standards (such as Dun & Bradstreet or Robert Morris Associates). All data must be shown in total dollars and also in common size form, obtained by expressing all balance sheet items as a percentage of assets and all income and expense items as a percentage of sales. The lender's credit analysis must address the borrower's management, repayment ability including a cash-flow analysis, history of debt repayment, necessity of any debt refinancing, and the credit reports of the borrower, its principals, and any parent, affiliate, or subsidiary.

(9) Commercial credit reports obtained by the lender on the borrower and any parent, affiliate, and subsidiary firms.

(10) Current personal and corporate financial statements of any guarantors.

(11) A proposed Loan Agreement or a sample Loan Agreement with an attached list of the proposed Loan Agreement provisions. The Loan Agreement must be executed by the lender and borrower before the Agency issues a Loan Note Guarantee. The following requirements must be addressed in the Loan Agreement:

(i) Prohibition against assuming liabilities or obligations of others.

(ii) Restriction on dividend payments.

(iii) Limitation on the purchase or sale of equipment and fixed assets.

(iv) Limitation on compensation of officers and owners.

(v) Minimum working capital or current ratio requirement.

(vi) Maximum debt-to-net worth ratio.

(vii) Restrictions concerning consolidations, mergers, or other circumstances.

(viii) Limitations on selling the business without the concurrence of the lender.

(ix) Repayment and amortization of the loan.

(x) List of collateral and lien priority for the loan including a list of persons and corporations guaranteeing the loan

with a schedule for providing the lender with personal and corporate financial statements. Financial statements on the corporate and personal guarantors must be updated at least annually.

(xi) Type and frequency of financial statements to be required for the duration of the loan.

(xii) The final Loan Agreement between the lender and borrower will contain any additional requirements imposed by the Agency in its Conditional Commitment.

(xiii) A section for the later insertion of any necessary measures by the borrower to avoid or reduce adverse environmental impacts from this proposal's construction or operation. Such measures, if necessary, will be determined by the Agency through the completion of the environmental review process.

(12) A business plan, which includes, at a minimum, a description of the business and project, management experience, products and services, proposed use of funds, availability of labor, raw materials and supplies, and the names of any corporate parent, affiliates, and subsidiaries with a description of the relationship. Any or all of these requirements may be omitted if the information is included in a feasibility study.

(13) Independent feasibility study, if required.

(14) For companies listed on a major stock exchange or subject to the Securities and Exchange Commission (SEC) regulations, a copy of SEC Form 10-K, "Annual Report Pursuant to Section 13 or 15D of the Act of 1934."

(15) For health care facilities, a certificate of need, if required by statute.

(16) A certification by the lender that it has completed a comprehensive analysis of the proposal, the applicant is eligible, the loan is for authorized purposes, and there is reasonable assurance of repayment ability based on the borrower's history, projections and equity, and the collateral to be obtained.

(17) Any additional information required by the Agency.

(c) *Applications of \$600,000 and less.* Guaranteed loan applications may be processed under this paragraph if the request does not exceed \$400,000. Beginning in fiscal year 2004, this limit may be increased on a case-by-case basis to

\$600,000 provided that the Agency determines that there is not a significant increased risk of a default on the loan. Applications may be resubmitted under paragraph (b) of this section when the application under this paragraph contains insufficient information for the Agency to guarantee the loan. Applications submitted under this paragraph must use the Agency's short application form and include the information contained in paragraphs (b)(3), (5), (7), (8), and (11) of this section. The lender must have the documentation identified in paragraph (b) of this section, with the exception of paragraphs (b)(1), (2), (14), and (15), available in its file for review.

[61 FR 67633, Dec. 23, 1996, as amended at 69 FR 64831, Nov. 9, 2004]

**§§ 4279.162–4279.164 [Reserved]**

**§ 4279.165 Evaluation of application.**

(a) *General review.* The Agency will evaluate the application and make a determination whether the borrower is eligible, the proposed loan is for an eligible purpose, there is reasonable assurance of repayment ability, there is sufficient collateral and equity, and the proposed loan complies with all applicable statutes and regulations. If the Agency determines it is unable to guarantee the loan, the lender will be informed in writing. Such notification will include the reasons for denial of the guarantee.

(b) *Environmental requirements.* The environmental review process must be completed, in accordance with subpart G of part 1940 of this title, prior to the issuance of the Conditional Commitment, loan approval, or obligation of funds, whichever occurs first.

**§§ 4279.166–4279.172 [Reserved]**

**§ 4279.173 Loan approval and obligating funds.**

(a) Upon approval of a loan guarantee, the Agency will issue a Conditional Commitment to the lender containing conditions under which a Loan Note Guarantee will be issued.

(b) If certain conditions of the Conditional Commitment cannot be met, the

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lender and applicant may propose alternate conditions. Within the requirements of the applicable regulations and instructions and prudent lending practices, the Agency may negotiate with the lender and the applicant regarding any proposed changes to the Conditional Commitment.

### §4279.174 Transfer of lenders.

(a) The loan approval official may approve the substitution of a new eligible lender in place of a former lender who holds an outstanding Conditional Commitment when the Loan Note Guarantee has not yet been issued provided, that there are no changes in the borrower's ownership or control, loan purposes, or scope of project and loan conditions in the Conditional Commitment and the Loan Agreement remain the same.

(b) The new lender's servicing capability, eligibility, and experience will be analyzed by the Agency prior to approval of the substitution. The original lender will provide the Agency with a letter stating the reasons it no longer desires to be a lender for the project. The substituted lender must execute a new part B of Form 4279-1.

### §4279.175 Domestic lamb industry adjustment assistance program set aside.

A 3-year set aside of B&I Guaranteed Loan Program funds has been established in the National Office to fund loans to lamb processors for real estate purchases and improvements; working capital; debt refinancing; and upgrading, replacing, and installing new processing and packaging equipment for domestic lamb packing and processing plants. The set aside is \$15 million for FY 2001, \$5 million for FY 2002, and \$5 million for FY 2003. These funds will be available through the third quarter of each respective year and, if not used, will revert for use in the general program.

[65 FR 64597, Oct. 30, 2000]

### §§4279.176–4279.179 [Reserved]

### §4279.180 Changes in borrower.

Any changes in borrower ownership or organization prior to the issuance of the Loan Note Guarantee must meet

the eligibility requirements of the program and be approved by the Agency loan approval official.

### §4279.181 Conditions precedent to issuance of Loan Note Guarantee.

The Loan Note Guarantee will not be issued until the lender, including a CLP lender, certifies to the following:

(a) No major changes have been made in the lender's loan conditions and requirements since the issuance of the Conditional Commitment, unless such changes have been approved by the Agency.

(b) All planned property acquisition has been or will be completed, all development has been or will be substantially completed in accordance with plans and specifications, conforms with applicable Federal, state, and local codes, and costs have not exceeded the amount approved by the lender and the Agency.

(c) Required hazard, flood, liability, worker compensation, and personal life insurance, when required, are in effect.

(d) Truth-in-lending requirements have been met.

(e) All equal credit opportunity requirements have been met.

(f) The loan has been properly closed, and the required security instruments have been obtained or will be obtained on any acquired property that cannot be covered initially under State law.

(g) The borrower has marketable title to the collateral then owned by the borrower, subject to the instrument securing the loan to be guaranteed and to any other exceptions approved in writing by the Agency.

(h) When required, the entire amount of the loan for working capital has been disbursed except in cases where the Agency has approved disbursement over an extended period of time.

(i) When required, personal, partnership, or corporate guarantees have been obtained.

(j) All other requirements of the Conditional Commitment have been met.

(k) Lien priorities are consistent with the requirements of the Conditional Commitment. No claims or liens of laborers, subcontractors, suppliers of machinery and equipment, or other parties have been or will be filed against the collateral and no suits are

pending or threatened that would adversely affect the collateral when the security instruments are filed.

(l) The loan proceeds have been or will be disbursed for purposes and in amounts consistent with the Conditional Commitment and Form 4279-1. A copy of the detailed loan settlement of the lender must be attached to support this certification.

(m) There has been neither any material adverse change in the borrower's financial condition nor any other material adverse change in the borrower, for any reason, during the period of time from the Agency's issuance of the Conditional Commitment to issuance of the Loan Note Guarantee regardless of the cause or causes of the change and whether or not the change or causes of the change were within the lender's or borrower's control. The lender must address any assumptions or reservations in the requirement and must address all adverse changes of the borrower, any parent, affiliate, or subsidiary of the borrower, and guarantors.

(n) None of the lender's officers, directors, stockholders, or other owners (except stockholders in an institution that has normal stockshare requirements for participation) has a substantial financial interest in the borrower and neither the borrower nor its officers, directors, stockholders, or other owners has a substantial financial interest in the lender. If the borrower is a member of the board of directors or an officer of a Farm Credit System (FCS) institution that is the lender, the lender will certify that an FCS institution on the next highest level will independently process the loan request and act as the lender's agent in servicing the account.

(o) The Loan Agreement includes all measures identified in the Agency's environmental impact analysis for this proposal (measures with which the borrower must comply) for the purpose of avoiding or reducing adverse environmental impacts of the proposal's construction or operation.

§§ 4279.182–4279.185 [Reserved]

§ 4279.186 Issuance of the guarantee.

(a) When loan closing plans are established, the lender will notify the Agency. Coincident with, or immediately after loan closing, the lender will provide the following to the Agency:

(1) Lender's certifications as required by § 4279.181.

(2) Executed Lender's Agreement.

(3) Form FmHA 1980-19, "Guaranteed Loan Closing Report," and appropriate guarantee fee.

(b) When the Agency is satisfied that all conditions for the guarantee have been met, the Loan Note Guarantee and the following documents, as appropriate, will be issued:

(1) *Assignment Guarantee Agreement*. In the event the lender uses the single note option and assigns the guaranteed portion of the loan to a holder, the lender, holder, and the Agency will execute the Assignment Guarantee Agreement; and

(2) *Certificate of Incumbency*. If requested by the lender, the Agency will provide the lender with a certification on Form 4279-7, "Certificate of Incumbency and Signature (Business and Industry)," of the signature and title of the Agency official who signs the Loan Note Guarantee, Lender's Agreement, and Assignment Guarantee Agreement.

(c) The Agency may, at its discretion, request copies of loan documents for its file.

(d) There may be instances when not all of the working capital has been disbursed, and it appears practical to disburse the balance over a period of time. The State Director, after review of a disbursement plan, may amend the Conditional Commitment in accordance with the disbursement plan and issue the guarantee.

§ 4279.187 Refusal to execute Loan Note Guarantee.

If the Agency determines that it cannot execute the Loan Note Guarantee, the Agency will promptly inform the lender of the reasons and give the lender a reasonable period within which to satisfy the objections. If the lender requests additional time in writing and within the period allowed, the Agency may grant the request. If the lender

satisfies the objections within the time allowed, the guarantee will be issued.

**§§ 4279.188–4279.199 [Reserved]**

**§ 4279.200 OMB control number.**

The information collection requirements contained in this regulation have been approved by OMB and have been assigned OMB control number 0575–0170. Public reporting burden for this collection of information is estimated to vary from 30 minutes to 54 hours per response, with an average of 27 hours per response, including time for reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Department of Agriculture, Clearance Officer, OIRM, Stop 7630, Washington, DC 20250. You are not required to respond to this collection of information unless it displays a currently valid OMB control number.

**Subpart C—Biorefinery Assistance Loans**

SOURCE: 76 FR 8461, Feb. 14, 2011, unless otherwise noted.

**§ 4279.201 Purpose and scope.**

The purpose and scope of this subpart is to provide financial assistance for the development and construction of commercial-scale biorefineries or for the retrofitting of existing facilities using eligible technology for the development of advanced biofuels.

**§ 4279.202 Compliance with §§ 4279.1 through 4279.84.**

Except as specified in paragraphs (a) through (l) of this section, all loans guaranteed under this subpart shall comply with the provisions found in §§ 4279.1 through 4279.84 of this title.

(a) *Definitions.* The terms used in this subpart are defined in either § 4279.2 or in this paragraph. If a term is defined in both § 4279.2 and this paragraph, it will have, for purposes of this subpart only, the meaning given in this section.

*Advanced biofuel.* Fuel derived from renewable biomass, other than corn kernel starch, to include:

(i) Biofuel derived from cellulose, hemicellulose, or lignin;

(ii) Biofuel derived from sugar and starch (other than ethanol derived from corn kernel starch);

(iii) Biofuel derived from waste material, including crop residue, other vegetative waste material, animal waste, food waste, and yard waste;

(iv) Diesel-equivalent fuel derived from renewable biomass, including vegetable oil and animal fat;

(v) Biogas (including landfill gas and sewage waste treatment gas) produced through the conversion of organic matter from renewable biomass;

(vi) Butanol or other alcohols produced through the conversion of organic matter from renewable biomass; and

(vii) Other fuel derived from cellulosic biomass.

*Agricultural producer.* An individual or entity directly engaged in the production of agricultural products, including crops (including farming); livestock (including ranching); forestry products; hydroponics; nursery stock; or aquaculture, whereby 50 percent or greater of their gross income is derived from the operations.

*Association of agricultural producers.* An organization that represents agricultural producers and whose mission includes working on behalf of such producers and the majority of whose membership and board of directors is comprised of agricultural producers.

*Biobased product.* A product determined by the Secretary to be a commercial or industrial product (other than food or feed) that is either:

(i) Composed, in whole or in significant part, of biological products, including renewable domestic agricultural materials and forestry materials; or

(ii) An intermediate ingredient or feedstock.

*Biofuel.* A fuel derived from renewable biomass.

*Biorefinery.* A facility (including equipment and processes) that converts renewable biomass into biofuels and biobased products and may produce electricity.

*Borrower.* Any party that borrows or seeks to borrow money from the lender, including any party or parties liable

for the guaranteed loan except guarantors.

*Business plan.* A comprehensive document that includes a clear description of the borrower's ownership structure and management experience, including, if applicable, discussion of a parent, affiliates, and subsidiaries, and a discussion of how the borrower will operate the proposed project, including, at a minimum, a description of the business and project; the products and services to be provided; the availability of the resources necessary to provide those products and services; and pro forma financial statements for a period of 2 years, including balance sheet, income and expense, and cash flows.

*Byproduct.* Any and all biobased products generated under normal operations of the proposed project that can be reasonably measured and monitored. Byproducts may or may not have a readily identifiable commercial use or value.

*Default.* The condition that exists when a borrower is not in compliance with the promissory note, the loan agreement, or other related documents evidencing the loan.

*Eligible project costs.* Those expenses approved by the Agency for the project.

*Eligible technology.* Eligible technology is defined as either:

(i) A technology that is being adopted in a viable commercial-scale operation of a biorefinery that produces an advanced biofuel; or

(ii) A technology not described in paragraph (i) of this definition that has been demonstrated to have technical and economic potential for commercial application in a biorefinery that produces an advanced biofuel.

*Existing business.* A business that has been in operation for at least one full year. Businesses that have undergone mergers, changes in the business name, changes in the legal type of entity, or expansions of product lines are considered to be existing businesses as long as there is not a significant change in operations.

*Farm cooperative.* A business owned and controlled by agricultural producers that is incorporated, or otherwise recognized by the state in which it operates, as a cooperatively operated business.

*Farmer Cooperative Organization.* An organization whose membership is composed of farm cooperatives.

*Feasibility study.* An analysis by an independent qualified consultant of the economic, market, technical, financial, and management feasibility of a proposed project or business in terms of its expectation for success.

*Indian tribe.* This term has the meaning as defined in 25 U.S.C. 450b.

*Institution of higher education.* This term has the meaning as defined in 20 U.S.C. 1002(a).

*Loan classification.* The assigned score or metric reflecting the lender's analysis of the degree of potential loss in the event of default.

*Local owner.* An individual who owns any portion of an eligible advanced biofuel biorefinery and whose primary residence is located within a certain distance from the biorefinery as specified by the Agency in a Notice published in the FEDERAL REGISTER.

*Market value.* The amount for which a property will sell for its highest and best use at a voluntary sale in an arm's length transaction.

*Material adverse change.* Any change in the purpose of the loan, the financial condition of the borrower, or the collateral that would likely jeopardize loan performance.

*Negligent loan origination.* The failure of a lender to perform those services that a reasonably prudent lender would perform in originating its own portfolio of unguaranteed loans. The term includes the concepts of failure to act, not acting in a timely manner, or acting in a manner contrary to the manner in which a reasonably prudent lender would act.

*Off-take agreement.* The terms and conditions governing the sale and transportation of biofuels, biobased products, and electricity produced by the borrower to another party.

*Project.* The facility or portion of a facility producing eligible advanced biofuels and any eligible biobased product receiving funding under this subpart.

*Protective advances.* Advances made by the lender for the purpose of preserving and protecting the collateral where the debtor has failed to, and will

not or cannot, meet its obligations to protect or preserve collateral.

*Renewable biomass.*

(i) Materials, pre-commercial thinnings, or invasive species from National Forest System land or public lands (as defined in section 103 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1702)) that:

(A) Are byproducts of preventive treatments that are removed to reduce hazardous fuels; to reduce or contain disease or insect infestation; or to restore ecosystem health;

(B) Would not otherwise be used for higher-value products; and

(C) Are harvested in accordance with applicable law and land management plans and the requirements for old-growth maintenance, restoration, and management direction of paragraphs (2), (3), and (4) of subsection (e) of section 102 of the Healthy Forests Restoration Act of 2003 (16 U.S.C. 6512) and large-tree retention of subsection (f) of that section; or

(ii) Any organic matter that is available on a renewable or recurring basis from non-Federal land or land belonging to an Indian or Indian tribe that is held in trust by the United States or subject to a restriction against alienation imposed by the United States, including:

(A) Renewable plant material, including feed grains; other agricultural commodities; other plants and trees; and algae; and

(B) Waste material, including crop residue; other vegetative waste material (including wood waste and wood residues); animal waste and byproducts (including fats, oils, greases, and manure); and food waste and yard waste.

*Retrofitting.* The modification of a building or equipment to incorporate functions not included in the original design that allow for the production of advanced biofuels.

*Rural or rural area.* Any area of a State not in a city or town that has a population of more than 50,000 inhabitants, according to the latest decennial census of the United States, or in the urbanized area contiguous and adjacent to a city or town that has a population of more than 50,000 inhabitants, and any area that has been determined to be “rural in character” by the Under

Secretary for Rural Development, or as otherwise identified in this definition.

(1) An area that is attached to the urbanized area of a city or town with more than 50,000 inhabitants by a contiguous area of urbanized census blocks that is not more than 2 census blocks wide. Applicants from such an area should work with their Rural Development State Office to request a determination of whether their project is located in a rural area under this provision.

(2) For the purposes of this definition, cities and towns are incorporated population centers with definite boundaries, local self government, and legal powers set forth in a charter granted by the State.

(3) For the Commonwealth of Puerto Rico, the island is considered rural and eligible for Business Programs assistance, except for the San Juan Census Designated Place (CDP) and any other CDP with greater than 50,000 inhabitants. CDPs with greater than 50,000 inhabitants, other than the San Juan CDP, may be determined to be eligible if they are “not urban in character.”

(4) For the State of Hawaii, all areas within the State are considered rural and eligible for Business Programs assistance, except for the Honolulu CDP within the County of Honolulu.

(5) For the purpose of defining a rural area in the Republic of Palau, the Federated States of Micronesia, and the Republic of the Marshall Islands, the Agency shall determine what constitutes rural and rural area based on available population data.

(6) The determination that an area is “rural in character” will be made by the Under Secretary of Rural Development. The process to request a determination under this provision is outlined in paragraph (6)(ii) of this definition.

(i) The determination that an area is “rural in character” under this definition will apply to areas that are within:

(A) An urbanized area that has two points on its boundary that are at least 40 miles apart, which is not contiguous or adjacent to a city or town that has a population of greater than 150,000 inhabitants or the urbanized area of such a city or town; or



(B) An urbanized area contiguous and adjacent to a city or town of greater than 50,000 inhabitants that is within one-quarter mile of a rural area.

(ii) Units of local government may petition the Under Secretary of Rural Development for a “rural in character” designation by submitting a petition to both the appropriate Rural Development State Director and the Administrator on behalf of the Under Secretary. The petition shall document how the area meets the requirements of paragraph (6)(i)(A) or (B) above and discuss why the petitioner believes the area is “rural in character,” including, but not limited to, the area’s population density, demographics, and topography and how the local economy is tied to a rural economic base. Upon receiving a petition, the Under Secretary will consult with the applicable Governor or leader in a similar position and request comments to be submitted within 5 business days, unless such comments were submitted with the petition. The Under Secretary will release to the public a notice of a petition filed by a unit of local government not later than 30 days after receipt of the petition by way of publication in a local newspaper and posting on the Agency’s Web site, and the Under Secretary will make a determination not less than 15 days, but no more than 60 days, after the release of the notice. Upon a negative determination, the Under Secretary will provide to the petitioner an opportunity to appeal a determination to the Under Secretary, and the petitioner will have 10 business days to appeal the determination and provide further information for consideration.

*Semi-work scale.* A manufacturing plant operating on a limited commercial scale to provide final tests of a new product or process.

*Startup business.* A business that has been in operation for less than one full year. Startup businesses include newly formed entities leasing space or constructing facilities in a new market area, even if the owners of the startup business own affiliated businesses doing the same kind of business. Newly formed entities that are buying existing businesses or facilities will be considered an existing business as long as

the business or facility being bought remains in operation and there is no significant change in operations.

*Tangible net worth.* Tangible assets minus liabilities.

*Technical and economic potential.* A technology not described in paragraph (i) of the definition of “eligible technology” is considered to have demonstrated “technical and economic potential” for commercial application in a biorefinery that produces an advanced biofuel if each of the following conditions is met:

(i) The advanced biofuel biorefinery’s likely financial and production success is evidenced in a thorough evaluation including, but not limited to:

- (A) Feedstocks;
- (B) Process engineering;
- (C) Siting;
- (D) Technology;
- (E) Energy production; and
- (F) Financial and sensitivity review

using a banking industry software analysis program with appropriate industry standards.

(ii) The evaluation in paragraph (i) of this definition is completed by an independent third-party expert in a feasibility study, technical report, or other analysis, which must be satisfactory to the Agency, that demonstrates the potential success of the project.

(iii) The advanced biofuel technology has successfully completed at least a 12-month (four seasons) operating cycle at semi-work scale.

*Tier 1 capital.* This term has the meaning given it under applicable Federal Deposit Insurance Corporation regulations.

*Tier 2 capital.* This term has the meaning given it under applicable Federal Deposit Insurance Corporation regulations.

*Tier 1 leverage capital ratio.* This term has the meaning given it under applicable Federal Deposit Insurance Corporation regulations.

*Tier 1 risk-based capital ratio.* This term has the meaning given it under applicable Federal Deposit Insurance Corporation regulations.

*Total project costs.* The sum of all costs associated with a completed project.

*Total qualifying capital.* This term has the meaning given to it under applicable Federal Deposit Insurance Corporation regulations.

*Total risk-based capital ratio.* This term has the meaning given it under applicable Federal Deposit Insurance Corporation regulations.

*Viable commercial-scale operation.* An operation is considered to be a viable commercial-scale operation if it demonstrates that:

- (i) Its revenue will be sufficient to recover the full cost of the project over the term of the loan and result in an anticipated annual rate of return sufficient to encourage investors or lenders to provide funding for the project;
- (ii) It will be able to operate profitably without public and private sector subsidies upon completion of construction (volumetric excise tax is not included as a subsidy);
- (iii) Contracts for feedstocks are adequate to address proposed off-take from the biorefinery;
- (iv) It has the ability to achieve market entry, suitable infrastructure to transport the advanced biofuel to its market is available, and the advanced biofuel technology and related products are generally competitive in the market;
- (v) It can be easily replicated and that replications can be sited at multiple facilities across a wide geographic area based on the proposed deployment plan; and
- (vi) The advanced biofuel technology has at least a 12-month (four seasons) successful operating history at semi-work scale, which demonstrates the ability to operate at a commercial scale.

*Working capital.* Current assets available to support a business's operations and growth. Working capital is calculated as current assets less current liabilities.

(b) *Exception authority.* The exception authority provisions of this paragraph apply to this subpart instead of those in § 4279.15. The Administrator may, with the concurrence of the Secretary of Agriculture, make an exception, on a case-by-case basis, to any requirement or provision of this subpart that is not inconsistent with any authorizing statute or applicable law, if the

Administrator determines that application of the requirement or provision would adversely affect the Federal government's interest.

(c) *Lender eligibility requirements.* The requirements specified in § 4279.29 do not apply to this subpart. Instead, a lender must meet the requirements specified in paragraphs (c)(1) through (c)(5) of this section in order to be approved for participation in this program.

(1) An eligible lender is any Federal or State chartered bank, Farm Credit Bank, other Farm Credit System institution with direct lending authority, and Bank for Cooperatives. These entities must be subject to credit examination and supervision by either an agency of the United States or a State. Credit unions subject to credit examination and supervision by either the National Credit Union Administration or a State agency, and insurance companies regulated by a State or National insurance regulatory agency are also eligible lenders. The National Rural Utilities Cooperative Finance Corporation is also an eligible lender. Savings and loan associations, mortgage companies, and other lenders as identified in 7 CFR 4279.29(b) are not eligible.

(2) The lender must demonstrate the minimum acceptable levels of capital specified in paragraphs (c)(2)(i) through (c)(2)(iii) of this section at the time of application and at time of issuance of the loan note guarantee. This information may be identified in Call Reports and Thrift Financial Reports. If the information is not identified in the Call Reports or Thrift Financial Reports, the lender will be required to calculate its levels and provide them to the Agency.

- (i) Total Risk-Based Capital ratio of 10 percent or higher;
- (ii) Tier 1 Risk-Based Capital ratio of 6 percent or higher; and
- (iii) Tier 1 Leverage Capital ratio of 5 percent or higher.

(3) The lender must not be debarred or suspended by the Federal government.

(4) If the lender is under a cease and desist order from a Federal agency, the lender must inform the Agency. The Agency will evaluate the lender's eligibility on a case-by-case basis given the

risk of loss posed by the cease and desist order.

(5) The Agency, in its sole determination, will approve applications for loan guarantees only from lenders with adequate experience and expertise, from similar projects, to make, secure, service, and collect loans approved under this subpart.

(d) *Independent credit risk analysis.* The Agency will require an evaluation and credit rating of the total project's indebtedness, without consideration for a government guarantee, from a nationally-recognized rating agency for loans of \$125,000,000 or more.

(e) *Environmental responsibilities.* The provisions of this paragraph shall be used instead of the provisions specified in § 4279.30(c) for determining a lender's environmental responsibilities under this subpart. Lenders have a responsibility to become familiar with Federal environmental requirements; to consider at the earliest planning stages, in consultation with the prospective borrower, the potential environmental impacts of their proposals; and to develop proposals that minimize the potential to adversely impact the environment.

(1) Lenders must alert the Agency to any controversial environmental issues related to a proposed project or items that may require extensive environmental review.

(2) Lenders must help the borrower prepare Form RD 1940–20, “Request for Environmental Information,” (when required by 7 CFR part 1940, subpart G, or successor regulations); assist in the collection of additional data when the Agency needs such data to complete its environmental review of the proposal; and assist in the resolution of environmental problems.

(3) Lenders must ensure that the borrower has:

(i) Provided the necessary environmental information to enable the Agency to undertake its environmental review process in accordance with 7 CFR part 1940, subpart G, or successor regulations, including the provision of all required Federal, State, and local permits;

(ii) Complied with any mitigation measures required by the Agency; and

(iii) Not taken any actions or incurred any obligations with respect to

the proposed project that will either limit the range of alternatives to be considered during the Agency's environmental review process or which will have an adverse effect on the environment.

(f) *Additional lender functions and responsibilities.* In addition to the requirements in § 4279.30, the requirements specified in paragraphs (f)(1) through (f)(3) apply.

(1) Any action or inaction on the part of the Agency does not relieve the lender of its responsibilities to originate and service the loan guaranteed under this subpart.

(2) The lender must compile a complete application for each guaranteed loan and maintain such application in its files for at least 3 years after the final loss has been paid.

(3) The lender must report to the Agency all conflicts of interest and appearances of conflicts of interest.

(g) *Certified lender program.* Section 4279.43 does not apply to this subpart.

(h) *Oversight and monitoring.* In addition to complying with requirements specified in § 4279.44, the lender will cooperate fully with Agency oversight and monitoring of all lenders involved in any manner with any guarantee under the Biorefinery Assistance program to ensure compliance with this subpart. Such oversight and monitoring will include, but is not limited to, reviewing lender records and meeting with lenders (in accordance with § 4287.107(c)).

(i) *Conditions of guarantee.* All loan guarantees under this subpart are subject to the provisions of § 4279.72, except for § 4279.72(b), and the provisions specified in paragraphs (i)(1) through (i)(5) of this section.

(1) The entire loan, the guaranteed and unguaranteed portions, must be secured by a first lien on all collateral necessary to run the project. The Agency may consider a subordinate lien position on inventory and accounts receivable for working capital loans provided: The Agency determines the working capital is necessary for the operation; with the subordination, the Agency remains adequately secured; and the subordination is in the best interests of the Government.

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(2) The holder of a guaranteed portion shall have all rights of payment, as defined in the loan note guarantee, to the extent of the portion purchased. Even if all or a portion of the loan note guarantee has been sold to a holder, the lender will remain bound by all obligations under the loan note guarantee, Lender's Agreement, and Agency program regulations.

(3) The lender must be shown as an additional insured on insurance policies (or other risk sharing instruments) that benefit the project and must be able to assume any contracts that are material to running the project, including any feedstock or off-take agreements, as may be applicable.

(4) If a lender does not satisfactorily comply with the provision found in § 4279.256(c) and such failure leads to losses, then such losses may not be recoverable under the guarantee.

(5) When a guaranteed portion of a loan is sold to a holder, the holder shall succeed to all rights of the lender under the Loan Note Guarantee to the extent of the portion purchased. The lender will remain bound to all obligations under the Loan Note Guarantee, Lender's Agreement, and the Agency program regulations. A guarantee and right to require purchase will be directly enforceable by a holder notwithstanding any fraud or misrepresentation by the lender or any unenforceability of the guarantee by the lender, except for fraud or misrepresentation of which the holder had actual knowledge at the time it became the holder or in which the holder participates or condones. The lender will reimburse the Agency for any payments the Agency makes to a holder of lender's guaranteed loan that, under the Loan Note Guarantee, would not have been paid to the lender had the lender retained the entire interest in the guaranteed loan and not conveyed an interest to a holder.

(j) *Sale or assignment of guaranteed loan.* The provisions of § 4279.75 apply to this subpart.

(k) *Minimum retention.* The provisions of § 4279.77 apply to this subpart, except that the lender is required to hold in its own portfolio a minimum of 7.5 percent of the total loan amount.

(1) *Replacement of document.* Documents must be replaced in accordance with § 4279.84, except, in § 4279.84(b)(1)(v), a full statement of the circumstances of any defacement or mutilation of the Loan Note Guarantee or Assignment Guarantee Agreement would also need to be provided.

### §§ 4279.203–4279.223 [Reserved]

#### § 4279.224 Loan processing.

Processing of Biorefinery Assistance Guaranteed loans under this subpart shall comply with the provisions found in §§ 4279.107 through 4279.187 of this chapter, except as provided in the following sections.

#### § 4279.225 Ineligible loan purposes.

For the purposes of this subpart, the ineligible purposes identified in § 4279.114(b), (c), and (p) do not apply to this subpart.

#### § 4279.226 Fees.

Fees will be determined according to the provisions of this section in lieu of § 4279.107.

(a) *Guarantee fee.* The guarantee fee will be paid to the Agency by the lender and is nonrefundable. The fee may be passed on to the borrower. Issuance of the Loan Note Guarantee is conditioned on payment of the guarantee fee by closing. The guarantee fee will be the percentage specified in paragraphs (a)(1) or (a)(2) of this section, as applicable, unless otherwise specified by the Agency in a notice published in the FEDERAL REGISTER, multiplied by the principal loan amount multiplied by the percent of guarantee and will be paid one time only at the time the Loan Note Guarantee is issued.

(1) For loans receiving a 90 percent guarantee, the guarantee fee is three percent.

(2) For loans receiving less than a 90 percent guarantee, the guarantee fee is:

(i) Two percent for guarantees on loans greater than 75 percent of total project costs.

(ii) One and one-half percent for guarantees on loans of greater than 65 percent but less than or equal to 75 percent of total project costs.

(iii) One percent for guarantees on loans of 65 percent or less of total project costs.

(b) *Annual renewal fee.* The annual renewal fee, which may be passed on to the borrower, will be paid to the Agency for as long as the guaranteed loan is outstanding and is payable during the construction period. Unless otherwise specified by the Agency in a notice published in the FEDERAL REGISTER, the annual renewal fee shall be as follows:

(1) One hundred basis points (1 percent) for guarantees on loans that were originally greater than 75 percent of total project costs.

(2) Seventy five basis points (0.75 percent) for guarantees on loans that were originally greater than 65 percent but less than or equal to 75 percent of total project costs.

(3) Fifty basis points (0.50 percent) for guarantees on loans that were originally for 65 percent or less of total project costs.

**§ 4279.227 Borrower eligibility.**

Borrower eligibility will be determined according to the provisions of this section in lieu of §4279.108.

(a) *Eligible entities.* To be eligible, a borrower must meet the requirements specified in paragraphs (a)(1) and (a)(2) of this section, as applicable.

(1) *Type of borrower.* The borrower must be one of the following:

- (i) An individual;
- (ii) An entity;
- (iii) An Indian tribe;
- (iv) A unit of State or local government;
- (v) A corporation;
- (vi) A farm cooperative;
- (vii) A farmer cooperative organization;
- (viii) An association of agricultural producers;
- (ix) A National Laboratory;
- (x) An institution of higher education;
- (xi) A rural electric cooperative;
- (xii) A public power entity; or
- (xiii) A consortium of any of the above entities.

(2) *Legal authority and responsibility.* Each borrower must have, or obtain before loan closing, the legal authority necessary to construct, operate, and

maintain the proposed facility and services and to obtain, give security for, and repay the proposed loan.

(b) *Ineligible entities.* A borrower will be considered ineligible for a guarantee if the borrower, any owner with more than 20 percent ownership interest in the borrower, or any owner with more than 3 percent ownership interest in the borrower if there is no owner with more than 20 percent ownership interest in the borrower:

(1) Has an outstanding judgment obtained by the U.S. in a Federal Court (other than U.S. Tax Court),

(2) Is delinquent on the payment of Federal income taxes,

(3) Is delinquent on a Federal debt, or

(4) Is debarred or suspended from receiving Federal assistance.

**§ 4279.228 Project eligibility.**

In lieu of the requirements specified in §4279.113, to be eligible for a guaranteed loan under this subpart, at a minimum, a borrower and project, as applicable, must meet each of the requirements specified in paragraphs (a) through (g) of this section.

(a) The project must be located in a State, as defined in §4279.2.

(b) The project must be for either:

(1) The development and construction of commercial-scale biorefineries using eligible technology or

(2) The retrofitting of existing facilities, including, but not limited to, wood products facilities and sugar mills, with eligible technology.

(c) The project must use an eligible feedstock for the production of advanced biofuels and biobased products. Eligible feedstocks include, but are not limited to, renewable biomass, including municipal solid waste consisting of renewable biomass, biosolids, treated sewage sludge, and byproducts of the pulp and paper industry. For the purposes of this subpart, recycled paper is not an eligible feedstock.

(d) The majority of the biorefinery production must be an advanced biofuel. Unless otherwise approved by the Agency, and determined to be in the best financial interest of the government, the advanced biofuel must be sold as a biofuel. The following will be considered in determining what constitutes the majority of production:

(1) When the biorefinery produces a biobased product and, if applicable, byproduct that has an established BTU content from a recognized Federal source, majority biofuel production will be based on BTU content of the advanced biofuel, the biobased product, and, if applicable, the byproduct, or

(2) When the biorefinery produces a biobased product or, if applicable, byproduct that does not have an established BTU content, then majority biofuel production will be based on output volume, using parameters announced by the Agency in periodic Notices in the FEDERAL REGISTER, of the advanced biofuel, the biobased product, and, if applicable, the byproduct.

(e) An advanced biofuel that is converted to another form of energy for sale will still be considered an advanced biofuel.

(f) The project must provide funds (e.g., cash, subordinate financing, non-federal grant) of not less than 20 percent of eligible project costs. All projects must meet the equity requirements specified in § 4279.234(c)(1).

(g) The Agency will consider refinancing only under either of the two conditions specified in paragraphs (g)(1) and (g)(2) of this section.

(1) Permanent financing used to refinance interim construction financing of the proposed project only if the application for the guaranteed loan under this subpart was approved prior to closing the interim loan for the construction of the facility.

(2) Refinancing that is no more than 20 percent of the loan for which the Agency is guaranteeing and the purpose of the refinance is to enable the Agency to establish a first lien position with respect to pre-existing collateral subject to a pre-existing lien and the refinancing would be in the best financial interests of the Federal Government.

#### § 4279.229 Guaranteed loan funding.

Instead of the provisions found in § 4279.119, the provisions of this section apply to loans guaranteed under this subpart.

(a) In administering this program's budgetary authority each fiscal year, the Agency will allocate up to, but no more, than 50 percent of its budgetary

authority to fund applications received by the end of the first application window, including those carried over from the previous application period. Any funds not obligated to support applications submitted by the end of the first application window will be available to support applications received by the end of the second window, including those carried over from the previous application period. The Agency, therefore, will have a minimum of 50 percent of each fiscal year's budgetary authority for this program available to support applications received by the end of the second application window.

(b) The amount of a loan guaranteed for a project under this subpart will not exceed 80 percent of total eligible project costs. Total Federal participation will not exceed 80 percent of total eligible project costs. The borrower needs to provide the remaining 20 percent from other non-Federal sources to complete the project. Eligible project costs are specified in paragraph (e) of this section.

(c) The maximum principal amount of a loan guaranteed under this subpart is \$250 million to one borrower; there is no minimum amount. If an eligible borrower receives other direct Federal funding (*i.e.*, direct loans and grants) for a project, the amount of the loan that the Agency will guarantee under this subpart must be reduced by the same amount of the other direct Federal funding that the eligible borrower received for the project. For example, an eligible borrower is applying for a loan guarantee on a \$1 million project. The borrower provides the minimum matching requirement of 20 percent, or \$200,000. This leaves \$800,000 in other funding needed to implement the project. If the borrower receives no other direct Federal funding for this project and requests a guarantee for the \$800,000, the Agency will consider a guarantee on the \$800,000. However, if this borrower receives \$100,000 in other direct Federal funding for this project, the Agency will only consider a guarantee on \$700,000.

(d) The maximum guarantee on the principal and interest due on a loan guaranteed under this subpart will be determined as specified in paragraphs (d)(1) through (d)(4) of this section.

## § 4279.230

(1) If the loan amount is equal to or less than \$125 million, 80 percent for the entire loan amount unless all of the conditions specified in paragraphs (d)(1)(i) through (d)(1)(iii) of this section are met, in which case 90 percent for the entire loan amount.

(i) Equity of 40 percent, excluding qualified intellectual property;

(ii) Feedstock and off-take contracts of at least 1 year in duration; and

(iii) Collateral coverage ratio, total discounted collateral value divided by total loan request, exceeding 1.5 to 1.

(2) If the loan amount is more than \$125 million and less than \$150 million, 80 percent for the entire loan amount.

(3) If the loan amount is equal to or more than \$150 million but less than \$200 million, 70 percent on the entire loan amount.

(4) If the loan amount is \$200 million up to and including \$250 million, 60 percent on the entire loan amount.

(e) Eligible project costs are only those costs associated with the items listed in paragraphs (e)(1) through (e)(7) of this section, as long as the items are an integral and necessary part of the total project, as determined by the Agency.

(1) Purchase and installation of equipment (new, refurbished, or re-manufactured), except agricultural tillage equipment, used equipment, and vehicles.

(2) Construction or retrofitting.

(3) Permit and license fees.

(4) Working capital.

(5) Land acquisition.

(6) Cost of financing, excluding guarantee and renewal fees.

(7) Any other item identified by the Agency in a notice published in the FEDERAL REGISTER.

(f) Loans made with the proceeds of any obligation the interest on which is excludable from income under the Internal Revenue Code are ineligible. Funds generated through the issuance of tax-exempt obligations cannot be used to purchase the guaranteed portion of any Agency guaranteed loan and an Agency guaranteed loan cannot serve as collateral for a tax-exempt issue. The Agency may guarantee a loan with respect to a project at a facility that has received, or will receive, tax-exempt financing only when the

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guaranteed loan funds are used to finance a project that is separate and distinct from the activities at the facility that have been or will be financed by the tax-exempt obligation, and the guaranteed loan has at least a parity security position with the tax-exempt obligation.

### § 4279.230 [Reserved]

#### § 4279.231 Interest rates.

The provisions found in § 4279.125 apply to loans guaranteed under this subpart, except as provided in paragraphs (a) through (c) of this section. Lenders are encouraged to pass interest-rate savings realized through the secondary market on to the borrower.

(a) The rate on the unguaranteed portion of the loan shall not exceed the rate on the guaranteed portion of the loan by more than 500 basis points;

(b) Variable rate loans will not provide for negative amortization nor will they give the borrower the ability to choose its payment among various options.

(c) Both the guaranteed and unguaranteed portions of the loan must be amortized over the same term, as provided in § 4279.232(a).

#### § 4279.232 Terms of loan.

Instead of the provisions found in § 4279.126, the provisions of this section apply to loans guaranteed under this subpart, except as provided in § 4279.232(e).

(a) The repayment term for a loan under this subpart will be for a maximum period of 20 years or the useful life of the project, as determined by the lender and confirmed by the Agency, whichever is less. The length of the loan term shall be the same for both the guaranteed and unguaranteed portions of the loan.

(b) Guarantees shall be provided only after consideration is given to the borrower's overall credit quality and to the terms and conditions of any applicable subsidies, tax credits, and other such incentives.

(c) All loans guaranteed under this subpart must be financially sound and feasible, with reasonable assurance of repayment.

(d) A loan's maturity will take into consideration the use of proceeds, the useful life of assets being financed, and the borrower's ability to repay the loan.

(e) Repayment of the loan shall be in accordance with § 4279.125(a) and § 4279.126(b) and (c).

#### § 4279.233 [Reserved]

#### § 4279.234 Credit evaluation.

Instead of the provisions found in § 4279.131, the provisions of this section apply to loans guaranteed under this subpart. For all applications for guarantee, the lender must prepare a credit evaluation. An acceptable credit evaluation must:

(a) Use credit documentation procedures and an underwriting process that are consistent with generally accepted commercial lending practices, and

(b) Include an analysis of the credit factors associated with each guarantee application, including consideration of each of the following five elements.

(1) *Credit worthiness.* Those financial qualities that generally make the borrower more likely to meet its obligations as demonstrated by its credit history.

(2) *Cash flow.* A borrower's ability to produce sufficient cash to repay the loan as agreed.

(3) *Capital.* The financial resources that the borrower currently has and those it is likely to have when payments are due. The borrower must be adequately capitalized.

(4) *Collateral.* The assets pledged by the borrower in support of the loan, including processing technology owned by the borrower and excluding assets acquired with other Federal funds. Collateral must have documented value sufficient to protect the interest of the lender and the Agency, and the discounted collateral value must be at least equal to the loan amount. Lenders will discount collateral consistent with sound loan-to-value policy. The Agency may consider the value of qualified intellectual property, as defined in § 4279.2, arrived at in accordance with GAAP standards. The value of the intellectual property may not exceed 30 percent of the total value of all collateral.

(i) If there is an established market for the intellectual property, the value of the intellectual property will be valued according to the lender's standard discounting practice for intellectual property for determining adequacy of collateral.

(ii) If there is no established market for the intellectual property, the value of the intellectual property will be valued not greater than 25 percent, as determined by the Agency, for determining adequacy of collateral.

(5) *Conditions.* The general business environment and status of the borrower's industry.

(c) When determining the credit quality of the borrower, the lender must include the following in its analysis:

(1) The borrower shall demonstrate that it will be able to provide equity in the project of not less than 20 percent of eligible project costs at the time the loan is closed. For existing biorefineries, the fair market value of project equity (including the guaranteed loan being applied for) in real property and equipment and the value of qualified intellectual property based on the audited financial statements in accordance with Generally Accepted Accounting Principles may be substituted in whole or in part to meet the equity requirement. However, the appraisal completed to establish the fair market value of the real property and equipment must not be more than 1 year old. The Agency may require the lender to provide a more recent appraisal in order to reflect current market conditions. The appraisal used to establish fair market value of the real property and equipment must conform to the requirements of § 4279.244. Otherwise, equity must be in the form of cash and cannot include other direct Federal funding (*i.e.*, loans and grants).

(2) The credit analysis must also include spreadsheets of the balance sheets and income statements of the borrower for the 3 previous years (for existing businesses), pro forma balance sheets at startup, and projected year-end balance sheets and income statements for a period of not less than 3 years of stabilized operation, with appropriate ratios and comparisons with industrial standards (such as Dun &



**§§ 4279.235–4279.236**

Bradstreet or Robert Morris Associates) to the extent industrial standards are available.

(3) All data must be shown in total dollars and also in common size form, obtained by expressing all balance sheet items as a percentage of assets and all income and expense items as a percentage of sales.

**§§ 4279.235–4279.236 [Reserved]**

**§ 4279.237 Financial statements.**

The provisions of § 4279.137 do not apply to this subpart. Instead, the submittal of financial statements with the loan guarantee application must meet the requirements specified in § 4279.261(c).

**§§ 4279.238–4279.243 [Reserved]**

**§ 4279.244 Appraisals.**

All appraisals must be in accordance with § 4279.144 and each appraisal must be a complete, self-contained appraisal. Lenders must complete at least a Transaction Screen Questionnaire for any undeveloped sites and a Phase I Environmental Site Assessment on existing business sites in accordance with ASTM International Standards, which should be provided to the appraiser for completion of the self-contained appraisal. Specialized appraisers will be required to complete appraisals under this section. The Agency may approve a waiver of this requirement only if a specialized appraiser does not exist in a specific industry or hiring one will cause an undue financial burden to the borrower.

**§§ 4279.245–4279.249 [Reserved]**

**§ 4279.250 Feasibility studies.**

The provisions of § 4279.150 do not apply to this subpart. Instead, feasibility studies must meet the requirements specified in § 4279.261(f).

**§§ 4279.251–4279.254 [Reserved]**

**§ 4279.255 Loan priorities.**

The provisions of § 4279.155 do not apply to this subpart.

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**§ 4279.256 Construction planning and performing development.**

The lender must comply with § 4279.156(a) through (c), except as otherwise provided in paragraphs (a) through (f) of this section.

(a) *Architectural and engineering practices.* Under paragraph § 4279.156(a), the lender must also ensure that all project facilities are designed utilizing accepted architectural and engineering practices that conform to the requirements of this subpart.

(b) *Onsite inspector.* The lender must provide an onsite project inspector.

(c) *Changes and cost overruns.* The borrower shall be responsible for any changes or cost overruns. If any such change or cost overrun occurs, then any change order must be expressly approved by the Agency, which approval shall not be unreasonably withheld, and neither the lender nor borrower will divert funds from purposes identified in the guaranteed loan application approved by the Agency to pay for any such change or cost overrun without the express written approval of the Agency. In no event will the current loan be modified or a subsequent guaranteed loan be approved to cover any such changes or costs. In the event of any of the aforementioned increases in cost or expenses, the borrower must provide for such increases in a manner that does not diminish the borrower's operating capital. Failure to comply with the terms of this paragraph will be considered a material adverse change in the borrower's financial condition, and the lender must address this matter, in writing, to the Agency's satisfaction.

(d) *New draw certifications.* The following three certifications are required for each new draw:

(1) Certification by the project engineer to the lender that the work referred to in the draw has been successfully completed;

(2) Certification from the lender that all debts have been paid and all mechanics' liens have been waived; and

(3) Certification from the lender that the borrower is complying with the Davis-Bacon Act.

(e) *Surety.* Surety, as the term is commonly used in the industry, will be required in cases when the guarantee

will be issued prior to completion of construction unless the contractor will receive a lump sum payment at the end of work. Surety will be made a part of the contract if the borrower requests it or if the contractor requests partial payments for construction work. In such cases where no surety is provided and the project involves pre-commercial technology, technology that is first of its type in the U.S., or new designs without sufficient operating hours to prove their merit, a latent defects bond may be required by the Agency to cover the work.

(f) *Reporting during construction.* During the construction of the project, lenders shall submit quarterly construction progress reports to the Agency. These reports must contain, at a minimum, planned and completed construction milestones, loan advances, and personnel hiring, training, and retention. This requirement applies to both the development and construction of commercial-scale biorefineries and to the retrofitting of existing facilities using eligible technology for the development of advanced biofuels. The lender must expeditiously report any problems in project development to the Agency.

#### §§ 4279.257–4279.258 [Reserved]

#### § 4279.259 Borrower responsibilities.

(a) *Federal, State, and local regulations.* Borrowers must comply with all Federal, State, and local laws and rules that are in existence and that affect the project including, but not limited to:

- (1) Land use zoning;
- (2) Health, safety, and sanitation standards as well as design and installation standards; and
- (3) Protection of the environment and consumer affairs.

(b) *Permits, agreements, and licenses.* Borrowers must obtain all permits, agreements, and licenses that are applicable to the project.

(c) *Insurance.* The borrower is responsible for maintaining all hazard, flood, liability, worker compensation, and personal life insurance, when required, on the project.

(d) *Access to borrower's records.* Except as provided by law, upon request by the

Agency, the borrower will permit representatives of the Agency (or other Federal agencies as authorized by the Agency) to inspect and make copies of any of the records of the borrower pertaining to any Agency-guaranteed loan. Such inspection and copying may be made during regular office hours of the borrower or at any other time agreed upon between the borrower and the Agency.

(e) *Access to the project.* The borrower must allow the Agency access to the project and its performance information until the loan is repaid in full and permit periodic inspections of the project by a representative of the Agency.

#### § 4279.260 Guarantee applications—general.

Unless otherwise noted, the provisions of § 4279.161 do not apply to this subpart. Instead, the application provisions of this section and § 4279.261 apply to the preparation of Biorefinery Assistance Guaranteed loan applications.

(a) *Application submittal.* For each guarantee request, the lender must submit to the Agency an application that is in conformance with § 4279.261. The methods of application submittal will be specified in the annual FEDERAL REGISTER notice.

(b) *Application deadline.* Unless otherwise specified by the Agency in a notice published in the Federal Register, complete applications must be received by the Agency on or before May 1 of each year to be considered for funding for that fiscal year. If the application deadline falls on a weekend or a Federally observed holiday, the deadline will be the next Federal business day.

(c) *Incomplete applications.* Incomplete applications will be rejected. Lenders will be informed of the elements that made the application incomplete. If a resubmitted application is received by the applicable application deadline, the Agency will reconsider the application.

(d) *Application withdrawal.* During the period between the submission of an application and the execution of documents, the lender must notify the Agency, in writing, if the project is no longer viable or the borrower is no longer requesting financial assistance

for the project. When the lender so notifies the Agency, the selection will be rescinded or the application withdrawn.

**§ 4279.261 Application for loan guarantee content.**

Approved lenders must submit an Agency-approved application form for each loan guarantee sought under this subpart. Loan guarantee applications from approved lenders must contain the information specified in paragraphs (a) through (n) of this section, organized pursuant to a table of contents in a chapter format, and in paragraph (o) of this section as applicable.

(a) *Project Summary.* Provide a concise summary of the proposed project and application information, project purpose and need, and project goals, including the following:

(1) *Title.* Provide a descriptive title of the project.

(2) *Borrower eligibility.* Describe how the borrower meets the eligibility criteria identified in § 4279.227.

(3) *Project eligibility.* Describe how the project meets the eligibility criteria identified in paragraph (c) of this section. Clearly state whether the application is for the construction and development of a biorefinery or for the retrofitting of an existing facility. Provide results from demonstration or pilot facilities that prove that the technology proposed to be used meets the definition of eligible technology. Additional project description information will be needed later in the application process.

(4) *Matching funds.* Submit a spreadsheet identifying sources, amounts, and availability of matching funds. The spreadsheet must also include a directory of matching funds source contact information. Attach any applications, correspondence, or other written communication between borrower and matching fund source.

(b) *Lender's analysis and credit evaluation.* This analysis shall conform to § 4279.232(b) and shall include:

(1) A summary of the technology to be used in the project;

(2) The viability of such technology for the particular project application;

(3) The development type (e.g., installation, construction, retrofit);

(4) The credit reports of the borrower, its principals, and any parent, affiliate, or subsidiary as follows:

(i) A personal credit report from an Agency-approved credit reporting company for individuals who are key employees of the borrower, as determined by the Agency, and for individuals owning 20 percent or more interest in the borrower or any owner with more than 10 percent ownership interest in the borrower if there is no owner with more than 20 percent ownership interest in the borrower, except for when the borrower is a corporation listed on a major stock exchange unless otherwise determined by the Agency; and

(ii) Commercial credit reports on the borrower and any parent, affiliate, and subsidiary firms;

(5) The credit analysis specified in § 4279.232(b);

(6) For loans of \$125 million or more, an evaluation and credit rating of the total project's indebtedness, without consideration for a government guarantee, from a nationally-recognized rating agency; and

(7) Whether the loan note guarantee is requested prior to construction or after completion of construction of the project.

(c) *Financial statements.* Financial statements as follows:

(1) For businesses that have been in existence for one or more years,

(i) The most recent audited financial statements of the borrower if the guaranteed loan is \$3 million or more, unless alternative financial statements are authorized by the Agency; or

(ii) The most recent audited or Agency-acceptable financial statements of the borrower if the guaranteed loan is less than \$3 million.

(2) For businesses that have been in existence for less than one year, the most recent Agency-authorized financial statements of the borrower regardless of the amount of the guaranteed loan request.

(3) For all businesses, a current (not more than 90 days old) balance sheet; a *pro forma* balance sheet at startup; and projected balance sheets, income and expense statements, and cash flow statements for a period of not less than 3 years of stabilized operation. Projections should be supported by a list of

assumptions showing the basis for the projections.

(4) Depending on the complexity of the project and the financial condition of the borrower, the Agency may request additional financial statements and additional related information.

(d) *Environmental information.* Environmental information required by the Agency to conduct its environmental reviews (as specified in Exhibit H of 7 CFR part 1940, subpart G).

(e) *Appraisals.* An appraisal conducted as specified under § 4279.244.

(f) *Feasibility study.* Elements in an acceptable feasibility study include, but are not limited to, the elements outlined in Table 1. In addition, as part of the feasibility study, a technical assessment of the project is required, as specified in paragraph (h) of this section.

TABLE 1—FEASIBILITY STUDY COMPONENTS

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(A) Executive Summary:	
	Introduction/Project Overview (Brief general overview of project location, size, etc.).
	Economic feasibility determination.
	Market feasibility determination.
	Technical feasibility determination.
	Financial feasibility determination.
	Management feasibility determination.
	Recommendations for implementation.
(B) Economic Feasibility:	
	Information regarding project site;
	Availability of trained or trainable labor;
	Availability of infrastructure, including utilities, and rail, air and road service to the site.
	Feedstock:
	Feedstock source management;
	Estimates of feedstock volumes and costs;
	Collection, Pre-Treatment, Transportation, and Storage; and
	Feedstock risks.
	Documentation that woody biomass feedstock from National Forest system lands or public lands cannot be used for a higher-value product.
	Impacts on existing manufacturing plants or other facilities that use similar feedstock if the borrower's proposed biofuel production technology is adopted.
	Projected impact on resource conservation, public health, and the environment.
	Detailed analysis of project costs including:
	Project management and professional services;
	Resource assessment;
	Project design and permitting;
	Land agreements and site preparation;
	Equipment requirements and system installation;
	Startup and shakedown; and
	Warranties, insurance, financing, and operation and maintenance costs.
	Overall economic impact of the project, including any additional markets created for agricultural and forestry products and agricultural waste material and the potential for rural economic development.
	Feasibility/plans of project to work with producer associations or cooperatives, including estimated amount of annual feedstock, biofuel, and byproduct purchased from or sold to producer associations and cooperatives.
(C) Market Feasibility:	
	Information on the sales organization and management;
	Nature and extent of market and market area;
	Marketing plans for sale of projected output—principal products and byproducts;
	Extent of competition, including other similar facilities in the market area;
	Commitments from customers or brokers—principal products and byproducts.
	Risks related to the Advanced Biofuel industry, including
	Industry status;

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TABLE 1—FEASIBILITY STUDY COMPONENTS—Continued

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	Specific market risks; and Competitive threats and advantages.
(D) Technical Feasibility:	
	Suitability of the selected site for the intended use.
	Scale of development for which the process technology has been proven ( <i>i.e.</i> , lab or bench, pilot, demonstration, or semi-work scale).
	Specific volume of the process (expressed either as volume of feedstock processed [tons per unit of time] or as product [gallons per unit of time]).
	Identification and estimation of project operation and development costs. Specify the level of accuracy of these estimates and the assumptions on which these estimates have been based.
	Ability of the proposed system to be commercially replicated.
	Risks related to:
	Construction of the Biorefinery;
	Advanced Biofuel production;
	Regulation and governmental action; and
	Design-related factors that may affect project success.
(E) Financial Feasibility:	
	Reliability of the financial projections and the assumptions on which the financial statements are based, including all sources and uses of project capital, private or public, such as Federal funds. Provide detailed analysis and description of projected balance sheets, income and expense statements, and cash flow statements over the useful life of the project.
	A detailed description of:
	Investment incentives;
	Productivity incentives;
	Loans and grants; and
	Other project authorities and subsidies that affect the project.
	Any constraints or limitations in the financial projections.
	Ability of the business to achieve the projected income and cash flow.
	Assessment of the cost accounting system.
	Availability of short-term credit or other means to meet seasonal business costs.
	Adequacy of raw materials and supplies.
	Sensitivity analysis, including feedstock and energy costs and product and byproduct prices.
	Risks related to:
	The project;
	Borrower financing plan;
	The operational units; and
	Tax issues.
(F) Management Feasibility:	
	Borrower and/or management's previous experience concerning:
	Biofuel production;
	Acquisition of feedstock;
	Marketing and sale of off-take; and
	The receipt of Federal financial assistance, including amount of funding, date received, purpose, and outcome.
	Management plan for procurement of feedstock and labor, marketing of the off-take, and management succession.
	Risks related to:
	Borrower as a company ( <i>e.g.</i> , development-stage);
	Conflicts of interest; and
	Management strengths and weaknesses.
(G) Qualifications:	
	A resume or statement of qualifications of the author of the feasibility study, including prior experience, must be submitted.

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(g) *Business plan.* The lender must submit a business plan that includes the information specified in paragraphs (g)(1) through (g)(10) of this section. Any or all of this information may be omitted if it is included in the feasibility study specified in paragraph (f) of this section.

- (1) The borrower's experience;
- (2) The borrower's succession planning, addressing both ownership and management;
- (3) The names and a description of the relationship of the borrower's parent, affiliates, and subsidiaries;
- (4) The borrower's business strategy;
- (5) Possible vendors and models of major system components;
- (6) The availability of the resources (e.g., labor, raw materials, supplies) necessary to provide the planned products and services;
- (7) Site location and its relation to product distribution (e.g., rail lines or highways) and any land use or other permits necessary to operate the facility;
- (8) The market for the product and its competition, including any and all competitive threats and advantages;
- (9) Projected balance sheets, income and expense statements, and cash flow statements for a period of not less than 3 years of stabilized operation; and
- (10) A description of the proposed use of funds.

(h) *Technical Assessment.* As part of the feasibility study required under paragraph (f) of this section, a detailed technical assessment is required for each project. The technical assessment must demonstrate that the design, procurement, installation, startup, operation and maintenance of the project will permit it to operate or perform as specified over its useful life in a reliable and a cost effective manner, and must identify what the useful life of the project is. The technical assessment must also identify all necessary project agreements, demonstrate that those agreements will be in place at or before the time of loan closing, and demonstrate that necessary project equipment and services will be available over the useful life of the project. The technical assessment must be based upon verifiable data and contain sufficient information and analysis so

that a determination can be made on the technical feasibility of achieving the levels of income or production that are projected in the financial statements. All technical information provided must follow the format specified in paragraphs (h)(1) through (h)(9) of this section. Supporting information may be submitted in other formats. Design drawings and process flow charts are required as exhibits. A discussion of a topic identified in paragraphs (h)(1) through (h)(9) of this section is not necessary if the topic is not applicable to the specific project. Questions identified in the Agency's technical review of the project must be answered to the Agency's satisfaction before the application will be approved. All projects require the services of an independent, third-party professional engineer.

(1) *Qualifications of project team.* The project team will vary according to the complexity and scale of the project. The project team must have demonstrated expertise in similar advanced biofuel technology development, engineering, installation, and maintenance. Authoritative evidence that project team service providers have the necessary professional credentials or relevant experience to perform the required services for the development, construction, and retrofitting, as applicable, of technology for producing advanced biofuels must be provided. In addition, authoritative evidence that vendors of proprietary components can provide necessary equipment and spare parts for the biorefinery to operate over its useful life must be provided. The application must:

(i) Discuss the proposed project delivery method. Such methods include a design-bid-build method, where a separate engineering firm may design the project and prepare a request for bids and the successful bidder constructs the project at the borrower's risk, and a design-build method, often referred to as "turnkey," where the borrower establishes the specifications for the project and secures the services of a developer who will design and build the project at the developer's risk;

(ii) Discuss the manufacturers of major components of advanced biofuels technology equipment being considered

in terms of the length of time in business and the number of units installed at the capacity and scale being considered;

(iii) Discuss the project team members' qualifications for engineering, designing, and installing advanced biofuels refineries, including any relevant certifications by recognized organizations or bodies. Provide a list of the same or similar projects designed, installed, or supplied and currently operating, with references if available; and

(iv) Describe the advanced biofuels refinery operator's qualifications and experience for servicing, operating, and maintaining such equipment or projects. Provide a list of the same or similar projects designed, installed, or supplied and currently operating, with references if available.

(2) *Agreements and permits.* The application must identify all necessary agreements and permits required for the project and the status and schedule for securing those agreements and permits, including the items specified in paragraphs (h)(2)(i) through (h)(2)(vi) of this section.

(i) Advanced biofuels refineries must be installed in accordance with applicable local, State, and national codes and applicable local, State, and Federal regulations. Identify zoning and code requirements and necessary permits and the schedule for meeting those requirements and securing those permits.

(ii) Identify licenses where required and the schedule for obtaining those licenses.

(iii) Identify land use agreements required for the project, the schedule for securing those agreements, and the term of those agreements.

(iv) Identify any permits or agreements required for solid, liquid, and gaseous emissions or effluents and the schedule for securing those permits and agreements.

(v) Identify available component warranties for the specific project location and size.

(vi) Identify all environmental issues, including environmental compliance issues, associated with the project.

(3) *Resource assessment.* The application must provide adequate and appropriate evidence of the availability of the feedstocks required for the advanced biofuels refinery to operate as designed. Indicate the type and quantity of the feedstock, and discuss storage of the feedstock, where applicable, and competing uses for the feedstock. Indicate shipping or receiving methods and required infrastructure for shipping, and other appropriate transportation mechanisms. For proposed projects with an established resource, provide a summary of the resource.

(4) *Design and engineering.* The application must provide authoritative evidence that the advanced biofuels refinery will be designed and engineered so as to meet its intended purposes, will ensure public safety, and will comply with applicable laws, regulations, agreements, permits, codes, and standards. Projects shall be engineered by a qualified entity. Each biorefinery must be engineered as a complete, integrated facility. The engineering must be comprehensive, including site selection, systems and component selection, and systems monitoring equipment. Biorefineries must be constructed by a qualified entity.

(i) The application must include a concise but complete description of the project, including location of the project; resource characteristics, including the kind and amount of feedstocks; biorefinery specifications; kind, amount, and quality of the output; and monitoring equipment. Address performance on a monthly and annual basis. Describe the uses of or the market for the advanced biofuels produced by the biorefinery. Discuss the impact of reduced or interrupted feedstock availability on the biorefinery's operations.

(ii) The application must include:

(A) A description of the project site that addresses issues such as site access, foundations, and backup equipment when applicable;

(B) A completed Form RD 1940-20 and an environmental assessment prepared in accordance with Exhibit H of 7 CFR part 1940, subpart G; and

(C) Identification of any unique construction and installation issues.

(iii) Sites must be controlled by the eligible borrower for at least the financing term of the loan note guarantee.

(5) *Project development schedule.* The application must describe each significant task, its beginning and end, and its relationship to the time needed to initiate and carry the project through startup and shakedown. Provide a detailed description of the project timeline including resource assessment, project and site design, permits and agreements, equipment procurement, and project construction from excavation through startup and shakedown.

(6) *Equipment procurement.* The application must demonstrate that equipment required by the biorefinery is available and can be procured and delivered within the proposed project development schedule. Biorefineries may be constructed of components manufactured in more than one location. Provide a description of any unique equipment procurement issues such as scheduling and timing of component manufacture and delivery, ordering, warranties, shipping, receiving, and on-site storage or inventory.

(7) *Equipment installation.* The application must provide a full description of the management of and plan for site development and systems installation, details regarding the scheduling of major installation equipment needed for project construction, and a description of the startup and shakedown specification and process and the conditions required for startup and shakedown for each equipment item individually and for the biorefinery as a whole.

(8) *Operations and maintenance.* The application must provide the operations and maintenance requirements of the biorefinery necessary for the biorefinery to operate as designed over its useful life. The application must also include:

(i) Information regarding available biorefinery and component warranties and availability of spare parts;

(ii) A description of the routine operations and maintenance requirements of the proposed biorefinery, including maintenance schedules for the mechanical, piping, and electrical systems and

system monitoring and control requirements, as well as provision of information that supports expected useful life of the biorefinery and timing of major component replacement or rebuilds;

(iii) A discussion of the costs and labor associated with operating and maintaining the biorefinery and plans for in-sourcing or outsourcing. A description of the opportunities for technology transfer for long-term project operations and maintenance by a local entity or owner/operator; and

(iv) Provision and discussion of the risk management plan for handling large, unanticipated failures of major components.

(9) *Decommissioning.* A description of the decommissioning process, when the project must be uninstalled or removed. A description of any issues, requirements, and costs for removal and disposal of the biorefinery.

(i) *Scoring information.* The application must contain information in a format that is responsive to the scoring criteria specified in §4279.265(d).

(j) *Loan Agreement.* A proposed loan agreement or a sample loan agreement with an attached list of the proposed loan agreement provisions as specified in §4279.161(b)(11).

(k) *Lender certifications.* The lender must provide certification in accordance with §4279.161(b)(16). In addition, the lender must certify that the lender concludes that the project has technical merit.

(l) *Intergovernmental consultation.* Intergovernmental consultation comments in accordance with RD Instruction 1940-J and 7 CFR part 3015, subpart V.

(m) *DUNS Number.* For borrowers other than individuals, a Dun and Bradstreet Universal Numbering System (DUNS) number, which can be obtained online at <http://fedgov.dnb.com/webform>.

(n) *Bioenergy experience.* Identify borrower's, including its principals', prior experience in bioenergy projects and the receipt of Federal financial assistance, including the amount of funding, date received, purpose, and outcome, for such projects.

(o) *Other information.* Any other information determined by the Agency to



be necessary to evaluate the application.

§§ 4279.262–4279.264 [Reserved]

**§ 4279.265 Guarantee application evaluation.**

Instead of evaluating applications using the provisions of §4279.165, the Agency will evaluate and award applications according to the provisions specified in paragraphs (a) through (h) of this section.

(a) *Application processing.* Upon receipt of a complete application, the Agency will conduct a review to determine if the borrower, lender, and project are eligible; if the project has technical merit as determined under paragraph (b) of this section; and if the minimum financial metric criteria under paragraph (c) of this section are met.

(1) If the borrower, lender, or the project is determined to be ineligible for any reason, the Agency will inform the lender, in writing, of the reasons. No further evaluation of the application will occur.

(2) If the Agency determines it is unable to guarantee the loan, the lender will be informed in writing. Such notification will include the reasons for denial of the guarantee.

(b) *Technical merit determination.* The Agency's determination of a project's technical merit will be based on the information in the application. Projects determined by the Agency to be without technical merit will not be selected for funding.

(c) *Financial metric criteria.* The borrower must meet the financial metric criteria specified in paragraphs (c)(1) through (c)(3) of this section. These financial metric criteria shall be calculated from the realistic information in the pro forma statements or borrower financial statements, submitted in accordance with §4279.261(c), of a typical operating year after the project is completed and stabilized.

(1) A debt coverage ratio of 1.0 or higher.

(2) A debt-to-tangible net worth ratio of 4:1 or lower for startup businesses and of 9:1 or lower for existing businesses.

(3) A discounted loan-to-value ratio of no more than 1.0.

(d) *Scoring applications.* The Agency will score each complete and eligible application it receives on or before May 1 in the fiscal year in which it was received. The Agency will score each eligible application that meets the minimum requirements for financial and technical feasibility using the evaluation criteria identified below. A maximum of 100 points is possible.

(1) Whether the borrower has established a market for the advanced biofuel and the byproducts produced and whether the advanced biofuel meets an applicable renewable fuel standard. A maximum of 10 points can be awarded. Points to be awarded will be determined as follows:

(i) If the business has less than or equal to a 50 percent commitment for each of the following: feedstocks, marketing agreements for the advanced biofuel, and the byproducts produced or if the project does not produce an advanced biofuel that meets an applicable renewable fuel standard, 0 points will be awarded.

(ii) If the business has a greater than 50 percent commitment for any one or two of the following: feedstocks, marketing agreements for the advanced biofuel, and the byproducts produced and if the project produces an advanced biofuel that meets an applicable renewable fuel standard, 5 points will be awarded.

(iii) If the business has a greater than 50 percent commitment for each of the following: Feedstocks, marketing agreements for the advanced biofuel, and the byproducts produced and if the project produces an advanced biofuel that meets an applicable renewable fuel standard, 10 points will be awarded.

(2) Whether the area in which the borrower proposes to place the biorefinery, defined as the area that will supply the feedstock to the proposed biorefinery, has any other similar advanced biofuel facilities. A maximum of 5 points can be awarded. Points to be awarded will be determined as follows:

(i) If the area that will supply the feedstock to the proposed biorefinery

does not have any other similar advanced biofuel biorefineries, 5 points will be awarded.

(ii) If there are other similar advanced biofuel biorefineries located within the area that will supply the feedstock to the proposed biorefinery, 0 points will be awarded.

(3) Whether the borrower is proposing to use a feedstock not previously used in the production of advanced biofuels. A maximum of 15 points can be awarded. Points to be awarded will be determined as follows:

(i) If the borrower proposes to use a feedstock previously used in the production of advanced biofuels in a commercial facility, 0 points will be awarded.

(ii) If the borrower proposes to use a feedstock not previously used in production of advanced biofuels in a commercial facility, 15 points will be awarded.

(4) Whether the borrower is proposing to work with producer associations or cooperatives. A maximum of 5 points can be awarded. Points to be awarded will be determined as follows:

(i) Five (5) points will be awarded if any one of the three conditions specified in paragraphs (d)(4)(i)(A) through (d)(4)(i)(C) of this section is met.

(A) At least 60 percent of the dollar value of feedstock to be used by the proposed biorefinery will be supplied by producer associations and cooperatives;

(B) At least 60 percent of the dollar value of the advanced biofuel to be produced by the proposed biorefinery will be sold to producer associations and cooperatives; or

(C) At least 60 percent of the dollar value of the biobased products to be produced by the proposed biorefinery will be sold to producer associations and cooperatives.

(ii) Three (3) points will be awarded if any one of the three conditions specified in paragraphs (d)(4)(ii)(A) through (d)(4)(ii)(C) of this section is met.

(A) At least 30 percent of the dollar value of feedstock to be used by the proposed biorefinery will be supplied by producer associations and cooperatives;

(B) At least 30 percent of the dollar value of the advanced biofuel, or an ad-

vanced biofuel converted to electricity, to be produced by the proposed biorefinery will be sold to producer associations and cooperatives; or

(C) At least 30 percent of the dollar value of the biobased products to be produced by the proposed biorefinery will be sold to producer associations and cooperatives.

For example, consider a proposed biorefinery that will purchase \$1,000,000 of feedstock and produce \$5,000,000 worth of biofuel and \$2,000,000 worth of biobased products. In order to receive the 5 points under this criterion, at least \$600,000 worth of feedstock purchases must be from producer associations or cooperatives, at least \$3,000,000 worth of biofuel must be sold to producer associations or cooperatives, or at least \$1,200,000 worth of biobased products must be sold to producer associations or cooperatives.

(5) The level of financial participation by the borrower, including support from non-Federal government sources and private sources. Other direct Federal funding (*i.e.*, direct loans and grants) will not be considered as part of the borrower's equity participation. A maximum of 15 points can be awarded. Points to be awarded will be determined as follows:

(i) If the borrower's equity plus other resources results in a debt-to-tangible net worth ratio equal to or less than 3 to 1, but greater than 2.5 to 1, 8 points will be awarded.

(ii) If the borrower's equity plus other resources results in a debt-to-tangible net worth ratio equal to or less than 2.5 to 1, 15 points will be awarded.

(iii) If a project uses other Federal direct funding, 10 points will be deducted.

(6) Whether the borrower has established that the adoption of the process proposed in the application will have a positive effect on three impact areas: resource conservation (e.g., water, soil, forest), public health (e.g., potable water, air quality), and the environment (e.g., compliance with an applicable renewable fuel standard, greenhouse gases, emissions, particulate matter). A maximum of 10 points can

be awarded. Based on what the borrower has provided in either the application or the feasibility study, points to be awarded will be determined as follows:

(i) If process adoption will have a positive impact on any one of the three impact areas (resource conservation, public health, or the environment), 3 points will be awarded.

(ii) If process adoption will have a positive impact on two of the three impact areas, 6 points will be awarded.

(iii) If process adoption will have a positive impact on all three impact areas, 10 points will be awarded.

(iv) If the project proposes to use a feedstock that can be used for human or animal consumption as a feedstock, 5 points will be deducted from the score.

(7) Whether the borrower can establish that, if adopted, the biofuels production technology proposed in the application will not have any economically significant negative impacts on existing manufacturing plants or other facilities that use similar feedstocks. A maximum of 10 points can be awarded. Points to be awarded will be determined as follows:

(i) If the borrower has not established, through an independent third party feasibility study, that the biofuels production technology proposed in the application, if adopted, will not have any economically significant negative impacts on existing manufacturing plants or other facilities that use similar feedstocks, 0 points will be awarded.

(ii) If the borrower has established, through an independent third party feasibility study, that the biofuels production technology proposed in the application, if adopted, will not have any economically significant negative impacts on existing manufacturing plants or other facilities that use similar feedstocks, 10 points will be awarded.

(iii) If the feedstock is wood pellets, no points will be awarded under this criterion.

(8) The potential for rural economic development. If the project is located in a rural area and the business creates jobs with an average wage that exceeds the County median household wages

where the biorefinery will be located, 10 points will be awarded.

(9) The level of local ownership of the biorefinery proposed in the application. A maximum of 5 points can be awarded. Points to be awarded will be determined as follows:

(i) If local owners have an ownership interest in the biorefinery of more than 20 percent but less than or equal to 50 percent, 3 points will be awarded.

(ii) If local owners have an ownership interest in the biorefinery of more than 50 percent, 5 points will be awarded.

(10) Whether the project can be replicated. A maximum of 10 points can be awarded. Points to be awarded will be determined as follows:

(i) If the project can be commercially replicated regionally (e.g., Northeast, Southwest, etc.), 5 points will be awarded.

(ii) If the project can be commercially replicated nationally, 10 points will be awarded.

(11) If the project uses a particular technology, system, or process that is not currently operating in the advanced biofuel market as of October 1 of the fiscal year for which the funding is available, 5 points will be awarded.

(12) The Administrator can award up to a maximum of 10 bonus points to applications that promote partnerships and other activities that assist in the development of new and emerging technologies for the development of advanced biofuels so as to increase the energy independence of the United States; promote resource conservation, public health, and the environment; diversify markets for agricultural and forestry products and agriculture waste material; and create jobs and enhance the economic development of the rural economy. These partnerships and other activities will be identified in a FEDERAL REGISTER notice each fiscal year. However, the Administrator's bonus points may not raise an applicant's score to more than 100 points.

(e) *Ranking of applications.* The Agency will rank all scored applications to create a priority list of scored applications for the program. Unless otherwise specified in a notice published in the FEDERAL REGISTER, the Agency will rank applications by approximately January 31 for complete and eligible

applications received on or before November 1 and by approximately July 31 for complete and eligible applications received on or before May 1.

(1) All applications received on or before November 1 and May 1 will be ranked by the Agency and will be competed against the other applications received on or before such date. All applications that are ranked will be considered for selection for funding for that application cycle.

(2) When an application scored in first set of applications is carried forward into the second set of applications, it will be competed against all of the applications in the second set using its score from the first set of applications.

(f) *Selection of applications for funding.* Using the priority list created under paragraph (e) of this section, the Agency will select applications for funding based on the criteria specified in paragraphs (f)(1) through (f)(3) of this section. The Agency will notify, in writing, lenders whose applications have been selected for funding.

(1) *Ranking.* The Agency will consider the score an application has received compared to the scores of other applications in the priority list, with higher scoring applications receiving first consideration for funding. A minimum score of 55 points is required in order to be considered for a guarantee.

(2) *Availability of budgetary authority.* The Agency will consider the size of the request relative to the budgetary authority that remains available to the program during the fiscal year.

(i) If there is insufficient budgetary authority during a particular funding period to select a higher scoring application, the Agency may elect to select the next highest scoring application for further processing. Before this occurs, the Agency will provide the borrower of the higher scoring application the opportunity to reduce the amount of its request to the amount of budgetary authority available. If the borrower agrees to lower its request, it must certify that the purposes of the project can be met, and the Agency must determine the project is financially feasible at the lower amount.

(ii) If the amount of funding required is greater than 25 percent of the pro-

gram's outstanding budgetary authority, the Agency may elect to select the next highest scoring application for further processing, provided the higher scoring borrower is notified of this action and given an opportunity to revise their application and resubmit it for an amount less than or equal to 25 percent of the program's outstanding budgetary authority.

(3) *Availability of other funding sources.* If other financial assistance is needed for the project, the Agency will consider the availability of other funding sources. If the lender cannot demonstrate that funds from these sources are available at the time of selecting applications for funding or potential funding, the Agency may instead select the next highest scoring application for further processing ahead of the higher scoring application.

(g) *Ranked applications not funded.* A ranked application that is not funded in the application cycle in which it was submitted will be carried forward one additional application cycle, which may be in the next fiscal year. The Agency will notify the lender in writing. If an application has been selected for funding, but has not been funded because additional information is needed, the Agency will notify the lender of what information is needed, including a timeframe for the lender to provide the information. If the lender does not provide the information within the specified timeframe, the Agency will remove the application from further consideration and will so notify the lender.

(h) *Wage rates.* As a condition of receiving a loan guaranteed under this subpart, each borrower shall ensure that all laborers and mechanics employed by contractors or subcontractors in the performance of construction work financed in whole or in part with guaranteed loan funds under this subpart shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with sections 3141 through 3144, 3146, and 3147 of title 40, U.S.C. Awards under this subpart are further subject to the relevant regulations contained in title 29 of the Code of Federal Regulations.

§§ 4279.266–4279.278 [Reserved]

**§ 4279.279 Domestic lamb industry adjustment assistance program.**

The provisions of § 4279.175 do not apply to this subpart.

**§ 4279.280 Changes in borrowers.**

All changes in borrowers must be in accordance with § 4279.180, but the eligibility requirements of this program apply.

**§ 4279.281 Conditions precedent to issuance of loan note guarantee.**

The loan note guarantee will not be issued until the lender certifies to the conditions identified in § 4279.181(a) through (o) of subpart B of this part and paragraphs (a) through (h) of this section. If the lender is unable to provide any of the certifications required under this section, the lender must provide an explanation satisfactory to the Agency as to why the lender is unable to provide the certification. The lender can request the guarantee prior to construction, but must still certify to all conditions in this section.

(a) For loans exceeding \$150,000, the lender has certified its compliance with the Anti-Lobby Act (18 U.S.C. 1913). Also, if any funds have been, or will be, paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this commitment providing for the United States to guarantee a loan, the lender shall completely disclose such lobbying activities in accordance with 31 U.S.C. 1352.

(b) Where applicable, the lender must certify that the borrower has obtained:

(1) A legal opinion relative to the title to rights-of-way and easements. Lenders are responsible for ensuring that borrowers have obtained valid, continuous, and adequate rights-of-way and easements needed for the construction, operation and maintenance of a facility.

(2) A title opinion or title insurance showing ownership of the land and all mortgages or other lien defects, restrictions, or encumbrances, if any. It is the responsibility of the lender to

ensure that the borrower has obtained and recorded such releases, consents, or subordinations to such property rights from holders of outstanding liens or other instruments as may be necessary for the construction, operation and maintenance of the facility and to provide the required security. For example, when a site is for major structures for utility-type facilities (such as a gas distribution system) and the lender and borrower are able to obtain only a right-of-way or easement on such site rather than a fee simple title, such a title opinion must be provided.

(c) The minimum financial criteria, including those financial criteria contained in the Conditional Commitment, have been maintained through the issuance of the loan note guarantee. Failure to maintain these financial criteria shall result in an ineligible application.

(d) Each borrower shall certify to the lender that all laborers and mechanics employed by contractors or subcontractors in the performance of construction work financed in whole or in part with guaranteed loan funds under this subpart shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with sections 3141 through 3144, 3146, and 3147 of title 40 U.S.C. Awards under this subpart are further subject to the relevant regulations contained in title 29 of the Code of Federal Regulations.

(e) The lender certifies that it has reviewed all contract documents and verified compliance with Sections 3141 through 3144, 3146, and 3147 of title 40 U.S.C., and title 29 of the Code of Federal Regulations. The lender will certify that the same process will be completed for all future contracts and any changes to existing contracts.

(f) The lender certifies that the proposed facility complies with all Federal, State, and local laws and regulatory rules that are in existence and that affect the project, the borrower, or lender activities.

(g) The lender will notify the Agency in writing whenever there has been a change in the classification of a loan within 15 calendar days of such change.

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(h) The lender certifies that the borrower has provided the equity in the project identified in the Conditional Commitment.

### §§ 4279.282–4279.289 [Reserved]

#### § 4279.290 Requirements after project construction.

Once the project has been constructed, the lender must:

(a) Provide the Agency annual reports from the borrower commencing the first full calendar year following the year in which project construction was completed and continuing for the life of the guaranteed loan. The borrower's reports will include, but not be limited to, the information specified in the following paragraphs, as applicable.

(1) The actual amount of advanced biofuels, biobased products, and, if applicable, byproducts produced in order to assess whether project goals related to majority production are being met;

(2) If applicable, documentation that identified health and/or sanitation problems have been solved;

(3) A summary of the cost of operating and maintaining the facility;

(4) A description of any maintenance or operational problems associated with the facility;

(5) Certification that the project is and has been in compliance with all applicable State and Federal environmental laws and regulations;

(6) The number of jobs created;

(7) A description of the status of the project's feedstock including, but not limited to, the feedstock being used, outstanding feedstock contracts, feedstock changes and interruptions, and quality of the feedstock;

(8) The results of the annual inspections conducted under paragraph (b) of this section; and

(b) For the life of the guaranteed loan, conduct annual inspections.

### §§ 4279.291–4279.300 [Reserved]

## PART 4280—LOANS AND GRANTS

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